No. 495

In the Supreme Court of the United States

OCTOBER TERM, 1948

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

WJR, THE GOODWILL STATION, INC. AND COASTAL PLAINS BROADCASTING CO., INC., INTERVENOR-RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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OPINIONS BELOW

The decision and order of the Federal Communications Commission have not yet been reported (R. 25–27). The opinions in the United States Court of Appeals for the District of Columbia Circuit have not yet been reported (R. 38–67).[1]

[1] These opinions have been printed, however, in 3 Pike and Fischer, *Radio Regulation*, p. 793, and 4 Pike and Fischer, *Radio Regulation*, p. 2056.

JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1948 (R. 67–68). The petition for a writ of certiorari was filed on January 4, 1949, and granted on February 28, 1949, in an order transferring the case to this Court's summary docket (R. 71). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment requires that the Federal Communications Commission must first hear oral argument on behalf of one who objects to the grant of an application to another for a new radio station before it may determine, in the light of the undisputed facts alleged by the objector and the applicable provisions of the Communications Act and the Commission's Rules and Standards, that no showing whatsoever has been made that the grant of the new application could operate as a modification of the objector's existing license.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.* (hereinafter referred to as the "Communications Act") are printed in Appendix A, *infra,* pp. 48–53.

STATEMENT

On May 28, 1946, Coastal Plains Broadcasting Company, Inc. (formerly Tarboro Broadcasting

Company, Inc.) filed an application for a construction permit for a new standard broadcast station to be located in Tarboro, North Carolina, and to operate on the frequency 760 kilocycles with 1 kilowatt power during the daytime hours only (R. 13–14). This application was consistent with Sections 3.22 and 3.25 (a) of the Commission's Rules and Regulations (4 F. R. 2715–2716; 5 F. R. 3670; 6 F. R. 2544, see Appendix A, *infra*, pp. 57, 58), authorizing the licensing of Class II stations operating daytime only on Class I or clear channels, among them the frequency 760 kilocycles. The Commission, upon examination of the application of Coastal Plains, on August 22, 1946, granted that application without hearing in accordance with Section 309 (a) of the Communications Act and Section 1.382 (a) (formerly Section 1.381) of the Commission's Rules (R. 14), which provides, in part, that the Commission will grant an application without hearing "where an application for radio facilities is proper upon its face and where it appears from an examination of the application and supporting data that * * * [*inter alia*] (b) a grant of the application would not involve modification, revocation, or nonrenewal of any existing license or outstanding construction permit; (c) a grant of the application would not cause additional electrical interference to an existing station or stations for which a construction permit is outstanding within its normally protected contour as

prescribed by the applicable Rules and Regulations; * * *" 11 F. R. 891, 177A–416, 13 F. R. 660, see Appendix A, *infra*, pp. 51, 53.

On September 10, 1946, WJR, The Goodwill Station, Inc., licensee of radio station WJR which operates with studios in Detroit, Michigan (R. 23), on 760 kilocycles with 50 kilowatt power, unlimited time, as a Class I–A clear channel station, filed a petition for reconsideration and hearing of the grant to Coastal Plains. The petition requested that the Coastal Plains grant be set aside and designated for a hearing in which WJR could participate. This petition was based on the allegation that "objectionable interference" to the service of WJR would be caused by the operation of the new station (R. 14–16). An engineering affidavit filed in support of the petition stated that the service of WJR would be interfered with during certain daytime hours in an area in which the field intensity of WJR's signal averages 32 microvolts per meter or less during daytime hours (R. 16–18).[2] Cf. Section 1.390 (c), formerly 1.387 (c), see Appendix A, *infra*, p. 55. In addition, the petition alleged

[2] Although the affidavit alleges that, during the winter season, the interference would occur at contours greater than 32 microvolts per meter, no allegation was made that this interference would occur at any time to service within the 100 microvolt-per-meter contour, and the case was considered both by the Commission and the Court below, without objection by the respondent, as one involving interference to service outside the 100 microvolt-per-meter contour.

that the Commission's action in granting the Coastal Plains application prior to the conclusion of a pending rulemaking proceeding, usually referred to as the "Clear Channel Hearing" (FCC Docket No. 6741), was improper in that it prejudices a grant of a future application for increased power that might be filed by WJR in the event that the Commission's Rules were changed to permit the entertaining of such applications (R. 15–16).

On October 18, 1946, Coastal Plains filed an opposition to the petition for reconsideration (R. 19–21) on the grounds, among others, that respondent "has not alleged that the proposed operation of Tarboro Broadcasting Company would cause any interference within the normally protected service area of station WJR" and that respondent "has not alleged nor has it proven any interference within its normally protected contours" (R. 19). No response to this opposition was filed by respondent.

By decision and order, dated December 17, 1946, the Commission denied the petition for reconsideration on the grounds that the interference which it was alleged would be caused to the service of WJR was not within the protection accorded by the Commission's Rules and Regulations (R. 25–27).[3] The decision of the Commission stated (R. 26):

[3] In its decision, the Commission noted that no question was raised as to the applicability of that provision in its

> Station WJR is a Class I–A station. Under the Commission's Rules and Standards, Class I–A stations are normally protected daytime to the 100 microvolt-per-meter contour. The area sought by petitioner to be protected is, according to the engineering affidavit accompanying the petition, served by Station WJR during the daytime with a signal intensity of 32 microvolts-per-meter or less, and is therefore outside the normally protected contour.

The Commission further found that it would not be in the public interest to set aside the Coastal Plains grant, made in compliance with the Rules, and which afforded a new primary service to 274,307 people in an area of 4,540 square miles solely because of the possibility that the grant might limit a future assignment to WJR on its Class I channel upon the termination of the Clear Channel Hearing (R. 26).

On January 7, 1947, the respondent filed an appeal in the United States Court of Appeals for the District of Columbia Circuit from the decision of the Commission denying its petition for reconsideration of the grant to Coastal Plains (R. 1–6). On January 13, 1947, Coastal Plains filed a notice

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Standards of Good Engineering Practice Concerning Standard Broadcast Stations having to do with a station which renders primary service to approximately 90 per cent of the population in an area outside its normally protected contours (R. 26, note 1). See Appendix A, *infra*, p. 60. Nor has such question been raised by the respondent in the subsequent proceedings in this case.

of intention to intervene in the appeal. The case was originally argued on March 13, 1947, before Chief Justice Groner and Justices Clark and Prettyman. It was reargued on June 11, and 12, 1947, by direction of the Court before Justices Stephens, Edgerton, Clark, Wilbur K. Miller and Prettyman. (R. 38.)[4]

In its decision, the court passed on the merits of the contention of the respondent that the Commission should have deferred action on the Coastal Plains application until the conclusion of the Clear Channel Hearing. On this issue, it unanimously concluded that this claim did not afford any basis for setting aside the grant to Coastal Plains. (R. 41.) The majority of the court held, however, that before the Commission could dispose of the remaining portion of respondent's petition relating to the claim that it was entitled to a statutory hearing on the modification of its license, it was required to afford respondent a hearing, including oral argument, on the "threshold" question of law, namely whether the interference respondent alleged it would suffer was objec-

[4] The order of the Court, dated May 22 and 27, 1947, requested reargument on all points. In addition it stated: "The court in particular requests, however, the presentation of argument and authorities in respect of the effect of the Communications Act, the rules and regulations of the Commission, and the due process clause of the Fifth Amendment upon the claimed right of hearing before the Commission upon the question whether the grant of the new application will operation as a modification of the existing license." (R. 37.)

tionable interference" against which it was protected under the Communications Act or the Rules and Regulations of the Commission (R. 41–55). The court below conceded that if this question were answered in the negative respondent's petition would be without merit (R. 42–43). It held, however, that the Commission could not decide this question of law without first affording respondent an oral hearing.

Justices Prettyman and Edgerton, dissenting, were of the opinion that respondent was not entitled to an oral hearing on a written petition which did not contain "at least some shadow of factual ground for his prayer" (R. 59–67).

SUMMARY OF ARGUMENT

I

In holding broadly that oral argument of questions of law is required by the Due Process Clause, the court below has adopted an approach which is in striking contrast to that taken by this Court when faced with related problems. It has often been held by this Court that questions of procedural due process are not to be solved by formulae or rigid generalizations, and that the constitutional necessities are to be determined in the light of the circumstances of the particular case. *E. g., Betts* v. *Brady,* 316 U. S. 455, 462; *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.,* 304 U. S. 333, 351.

A general requirement of oral argument is inconsistent with the practice of this and other courts. Its imposition in this case, moreover, ignores "the differences in origin and function between administrative bodies and courts [which precludes] wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *Wallace Corp.* v. *National Labor Relations Board,* 323 U. S. 248, 253.

This Court has stated that "Argument may be oral or written" (*Morgan* v. *United States,* 298 U. S. 468, 481), and, in *Yakus* v. *United States,* 321 U. S. 414, 436, rejected an attack on the validity of the Price Control Act for its failure to afford a guarantee of oral argument in all administrative protest proceedings. Only under a rule of such flexibility can procedures which are wasteful of both time and manpower be dispensed with, and the public and private interests affected properly served. The ultimate question of fairness cannot be answered by imposing a universal requirement of oral argument. The decision of the court below gives rise to the danger that unsubstantial and dilatory claims will be encouraged to a point which would seriously interfere with the efficient working of courts as well as administrative agencies.

II

There can be no question but that the respondent was fairly treated by the Commission in this case. No claim is made that respondent was denied full access to the processes of the Commission, that it was not offered a full opportunity to present its contentions in writing to the Commission, or that the Commission did not give adequate consideration to these contentions. The respondent did not even ask the Commission for the oral argument to which the court below held it to be entitled under the Due Process Clause. Its complaint to the court below was not that the Commission was unfair but, rather, that the Commission was wrong in denying the relief sought by the respondent.

What the respondent had asked the Commission to do was to set aside its grant of a construction permit to a third party, the intervener in this case, and either to defer action on the third-party application or hold a formal hearing in which such questions as whether the public interest requires operation of the new station at the cost of indirect modification of the respondent's license could be determined. But the Commission found, at the outset, that respondent's petition, viewed in its most favorable light, made no allegations of such interference as would work any modification of its license.

That ruling was patently correct under the Communications Act, the Commission's Rules and Standards, and pertinent judicial decisions. A station like respondent's, under the Commission's standards, is protected to the 100-microvolt-per-meter contour. But the interference alleged by the respondent was with a signal averaging only 32 microvolts per meter or less. In taking the respondent's pleading at face value and measuring it against rules the meaning of which is clear, the Commission hardly denied the respondent due process. Any error in the Commission's decision could be corrected on review and the substantial rights of the respondent thus entirely protected.

While agreeing that respondent's rights were to be measured against the statute and the Commission's rules and regulations, the court below seems to have held that the nature of a licensee's interest is such as to make oral argument constitutionally requisite. Contrary to the decisions of this Court (*e. g., Federal Communications Commission* v. *Sanders Radio Station,* 309 U. S. 470, 475), it attributed to a station licensee a property right apparently broader in scope than the non-property right conferred by the license when read in the light of the Act and regulations which are, as this Court has held, the measure of that right; *Federal Communications Commission* v. *National Broadcasting Company*

(*KOA*), 319 U. S. 239. In so doing, the court below compounded its error.

As the dissenters below found, the respondent's contentions were entirely unsubstantial. Nevertheless, the respondent was given an opportunity to make them and the Commission fully considered them. Under the circumstances, the respondent was deprived of neither a procedural nor a substantive right.

ARGUMENT

Introduction.—The court below has held that the Federal Communications Commission acted in contravention of the Due Process Clause when it concluded, on the basis of respondent's petition and intervenor-respondent's opposition, that respondent presented no such claim of modification of license as to entitle it to a hearing under the provisions of Section 312 (b) of the Communications Act,[5] in the light of the undisputed facts presented by respondent's petition and the applicable provisions of the Commission's Rules and Standards defining the extent of the protection to which respondent is entitled. In reaching this result, the court below did not pass on the correctness of the Commission's conclusion that respondent's petition was entirely without merit. It appears to hold that, whether or not that is so, the Due Process Clause is violated if the Commission does not first hear oral argument before

[5] See Appendix A, *infra*, p. 52.

it reaches the conclusion that respondent is not entitled to the statutory hearing afforded by Section 312 of the Act because its petition does not set out facts making the provisions of Section 312 applicable.

The decision of the court below is rested upon the broadest possible grounds. Beyond the fact that the interest for which the respondent seeks protection stems from a radio station license,[6] no special circumstances are pointed to which are deemed to make an oral argument essential to a fair hearing in this case. To the court below, the Due Process Clause imposes an inflexible requirement of oral hearing (R. 44):

> due process of law, as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like.

In Point I of our Argument, we shall show that there is no warrant whatever for such a rigorous reading and mechanical application of the Due Process Clause. Point II of the Argument is

[6] The bearing of the fact that the respondent is a radio station licensee is discussed in Point II, *infra*, pp. 43–45.

designed to show that under all the circumstances of this case, the respondent was, in fact, accorded procedural due process.

I

THE DUE PROCESS CLAUSE DOES NOT IMPOSE A UNIVERSAL REQUIREMENT OF A FORMAL HEARING CONSISTING OF AT LEAST ORAL ARGUMENT ON ALL ADMINISTRATIVE PROCEEDINGS, WITHOUT REGARD TO APPLICABLE STATUTORY PROVISIONS, THE NATURE OF THE INTERESTS INVOLVED, AND OTHER PERTINENT CONSIDERATIONS

The broad sweep of the decision below presents the fundamental question whether administrative agencies, in adjudicating specific issues in the conduct of their functions, must rely exclusively on procedures entailing oral argument of issues of law in order to afford due process. The issue thus presented is whether due process necessarily requires "audible process."

The mere statement of this issue—general in scope, rigid in application—is in striking contrast to the traditional and accepted approach of this Court to problems of procedural due process. This Court has consistently and carefully avoided any holdings of broad scope defining the occasions on which the Due Process Clause requires a particular type of procedure such as formal hearing of oral testimony or oral argument in connection with the conduct of administrative and, indeed, judicial proceedings. The reason for this caution is articulated in the observations of this Court in *Betts* v. *Brady*, 316 U. S. 455, 462:

> Due process of law is secured against invasion by the federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed.

Similarly, in the case of *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, 351, this Court has pointed out that "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights."

A reading of the opinion below makes inescapable the conclusion that the court below was imposing a universal requirement of formal hearing consisting of at least oral argument on all administrative processes, because of its view that

courts have traditionally dealt with questions of law in this way and that the consistent practices of the court are an accurate reflection of the requirements of due process. Two difficulties are, however, presented by this assumption. The first is that it is in fact not a universal practice of the courts to afford oral argument on every claim embodying a question of law, without regard to the nature of the claim, the context in which it arises, and the substantiality or frivolousness of the claim. The practice of this Court on motions to intervene and similar pleadings is but one illustration. For example, in *United States* v. *California,* No. 12, Original, the Commonwealth of Massachusetts, Robert E. Lee Jordan, and various California Indians were all denied leave to intervene, without oral argument. 327 U. S. 764; 329 U. S. 689; 332 U. S. 804, 805; 334 U. S. 825. This practice has particular significance here for, as was made clear below (R. 69), leave to intervene was, in essence, what the respondent was asking of the Commission. And as Justice Prettyman points out in his dissent below (R. 65), Rule 78 of the Federal Rules of Civil Procedure makes provision for disposition of matters on the pleadings without oral argument, without qualification as to whether the matters are interlocutory or may result in a final disposition. Under the decision of the court below, it would seem that Rule 78 and local court

rules adopted pursuant thereto[7] would be invalid in so far as they might be applied to motions to dismiss under Rule 12 (b), motions for summary judgment under Rule 56, motions to strike pleadings for insufficient defense under Rule 12 (f), motions to intervene under Rule 24, and motions to strike a pleading under Rule 33. Moreover, the courts have long reserved the power summarily to strike frivolous pleadings, which are generally described in the decisions as pleadings which conclusively appear to be legally insufficient on their face.[8]

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[7] Rule 78 provides that a district court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition. Many of the local court rules adopted pursuant to Rule 78, make clear that parties are not as a matter of right entitled to oral argument under any and all circumstances. See Local Court Rules Arkansas (W. D.) Rule 8; Iowa (N. D.) Rule 3; Ohio (N. D.) Rule 2; California (N. D.) Rule 3; California (S. D.) Rule 3; Louisiana (E. D.) Rule 3; Missouri (W. D.) Rule 10. See also *Suggested Local Rules for the United States District Court*, drafted by the Committee on Local District Court Rules of the Judicial Conference of Senior Circuit Judges, 4 Fed. Rules Serv. 1022. Rule 2 of the suggested Local Rules for the United States District Courts, typically provides, in part: "Motions, in general, shall be submitted and determined upon the motion papers hereinafter referred to. Oral arguments of motions will be permitted on application and proper showing."

[8] See *Piuma* v. *United States*, 126 F. 2d 601 (C. A. 9); *Leaver* v. *Parker*, 121 F. 2d 738 (C. A. 9); *Commander Milling Co.* v. *Westinghouse Electric and Manufacturing Co.*, 70 F. 2d 469 (C. A. 8); *Dominion National Bank of*

The second difficulty with the assumption of the court below, that in passing on the constitutional adequacy of all administrative proceedings due process must be equated to judicial process, is that it is contrary to the consistent view of this Court that, "The differences in origin and function between administrative bodies and courts preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248, 253; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134. Much the same view has been articulated by the English Courts in passing upon issues closely comparable to those presented in the instant case. *Local Government Board* v. *Arlidge* [1915] A. C. 120.[9]

Bristol v. *Olympia Cotton Mills*, 128 Fed. 181 (C.C.D.S.C.); *Hespe* v. *Corning Glass Works*, 9 F. Supp. 725 (W. D. N. Y.); and *United States* v. *Delaney*, 8 F. Supp. 224 (D. N. J.).

[9] The following excerpts from the opinions delivered in the House of Lords are especially illuminating in reflecting the considerations underlying the conclusion of the House of Lords that fair procedure by administrative bodies does not necessarily require judicial procedure.

In his opinion, Lord Haldane stated ([1915] A. C. at 132):

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The

But, as already stated, the basic difficulty with the decision of the court below lies in its attempt

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decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal."

In his opinion, Lord Shaw stated ([1915] A. C. at 138):

"My Lords, when a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term 'natural justice' means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old jus naturale it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous."

In his opinion, Lord Moulton stated ([1915] A. C. at 150–151):

"In the present case, however, the Legislature has provided an appeal, but it is an appeal to an administrative department of State and not to a judicial body. It is said, truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only

to distil out of the Due Process Clause a general requirement, admitting of virtually no exception,[10] of oral argument. We have already seen that such a generalizing approach is markedly inconsistent with that of this Court in the field of procedural due process. And there are additional decisions of this Court dealing directly with the problem of oral argument which point out the error of the court below. Thus, in the first *Morgan* case (298 U. S. 468, 481), this Court stated that "Argument may be oral or written."

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means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals. Parliament has wisely laid down certain rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. These rules are beyond the criticism of the Courts, and it is not their business to add to or take away from them, or even to discuss whether in the opinion of the individual members of the Court they are adequate or not. In the present case they appear to me to be abundantly sufficient to secure that the Local Government Board shall be fully seised of the facts of the case in which it is called in, and that it can and will get all necessary guidance as to the law. But even if my opinion were the reverse it would only indicate that I disapproved of the legislation. It could not give rise to any question as to the statutory procedure conforming or not conforming to any notions of my own as to 'natural justice.'"

[10] The only exception stated by the court below is in the decision of "such questions of law as may be involved in interlocutory orders * * *" (R. 44).

And in *Yakus* v. *United States*, 321 U. S. 414, the contention was made that the administrative hearing provided by the statute was inadequate, for one thing because of the lack of a guaranty that oral argument would be available. To this, the Court responded (321 U. S. at 436):

> While the hearing on a protest may be restricted to the presentation of documentary evidence, affidavits and briefs, the Act contemplates, and the Administrator's regulations provide for, a full oral hearing upon a showing that written evidence and briefs "will not permit the fair and expeditious disposition of the protest." * * * In advance of application to the Administrator for such a hearing we cannot well say whether its denial in any particular case would be a denial of due process.

This can only mean, in flat contradiction of the decision of the court below, that the Due Process Clause lays down no general requirement of oral argument and that whether oral argument is a constitutional requisite depends upon the circumstances of the particular case.[11]

[11] See also *Peoria Braumeister Co.* v. *Yellowley*, 123 F. 2d 637 (C. A. 7); *Woodmen of the World Life Insurance Association (Station WOW)* v. *Federal Radio Commission*, 65 F. 2d 484 (C. A. D. C.); *Sproul* v. *Federal Radio Commission*, 54 F 2d 444 (C. A. D. C.); *Foundation Company of Washington* v. *Federal Communications Commission* (C. A. D. C.), No. 9411, decided February 25, 1947 (appeal from denial by Commission without oral argument of petition for rehearing of grant of application of third person dismissed without oral

The court below has cited no decisions of this or any other court which in any way support its expansive holding. The cases of *Galpin* v. *Page*, 18 Wall. 350, 368, and *In re Galvin's Estate*, 153 Misc. 11, 274 N. Y. S. 846, relied on by the court below (R. 44, 48) are concerned solely with the question of compliance with due process requirements only so far as they relate to the question whether adequate notice had been afforded.[12] Only the de-

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argument by court); *State ex rel. School Dist. 8* v. *Cary*, 166 Wis. 103; *Local Government Board* v. *Arlidge*, *supra*.

[12] The case of *Galpin* v. *Page*, is obviously but one of many illustrations of the principle that a person may not be subjected to a personal judgment in judicial proceedings unless he has been afforded adequate notice and an opportunity to be heard.

The case of *In re Galvin's Estate* is concerned with a variant of this same principle. That decision does not at all hold that due process is denied if any claim of a party who has already appeared is dealt with by a procedure other than hearing of oral testimony or oral argument. That decision holds only that personal notice must be afforded a creditor where the statute provides for such personal notice, and that the alternative statutory procedure of dispensing with notice if the amount is small and the whereabouts of the creditor cannot be ascertained, by leaving the accounting nonfinal against such creditor, may be unconstitutional. It is, in any event, doubtful whether the Surrogate properly read the statute and whether a federal court would feel itself bound to reach the same result under the Fifth Amendment. For the *Galvin* decision would make unconstitutional every *in rem* proceeding where a party in interest is not first served even though the judgment would not be conclusive against such a party, and that party's possible interest in the *res* has been preserved.

The court below also relies on Webster's argument in

cisions of this Court in *Londoner* v. *Denver*, 210 U. S. 373, and *Morgan* v. *United States*, 304 U. S. 1; appear to be invoked by the court below in support of its ruling on the question of oral argument (R. 44). In *Londoner* v. *Denver*, a divided Court, Mr. Chief Justice Fuller and Mr. Justice Holmes dissenting, did hold that a state assessment proceeding did not comport with due process when affected landowners were not afforded an opportunity to be heard in support of complaints and objections filed by them. But in holding that "an opportunity * * * to submit in writing all objections to and complaints of the tax to the board" was not enough to satisfy due process requirements (210 U. S. at 386), the Court did not broadly rule, as did the court below, that oral argument is always an essential ingredient of due process. For the Court took pains to limit its ruling to "such circumstances" as were before it, among which was the lack of any opportunity to the taxpayers "to object in the courts to the assessment" (210 U. S. at 386; compare *infra*, p. 41). And in that very same year, in

Dartmouth College v. *Woodward*, 4 Wheat. 518, 581, as expressive of general principles pertinent in the instant case (R. 44). But in this part of his argument in the *Dartmouth College* case, Webster was addressing himself to the problem of whether any legislative alteration of the charter could be "the law of the land." He was not at all contending that the passage of the statute altering the charter would be in accordance with the "law of the land" if the trustees had been afforded an opportunity to be heard prior to the passage of the legislation.

an opinion by Mr. Justice Moody, who had spoken for the Court in the *Londoner* case, this Court stated that the hearing requirement was there imposed "for peculiar reasons, in some forms of taxation (see *Londoner* v. *Denver*, 210 U. S. 373)". *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 278.[13]

Morgan v. *United States*, 304 U. S. 1, also relied on by the court below, does not even mention oral argument as an essential ingredient of due process. In that case, this Court merely held that the right to submit argument implies a reasonable opportunity to know the claims of the opposing party and to meet them. See 304 U. S. at 18. Here there is no complaint that the respondent did not have full knowledge of the issues involved. Further, *Morgan* v. *United States*, 304 U. S. 1, like the earlier *Morgan* case, *supra*, 298 U. S. 468, involved a situation in which the applicable statute required a hearing. The case at bar does not involve the application of statutory provisions requiring a hearing to the pro-

[13] *Erie R. R. Co.* v. *Paterson*, 79 N. J. L. 512, relied on by the court below, simply follows the decision of this Court in the *Londoner* case. *State ex rel. Arnold* v. *Common Council*, 157 Wis. 505, and *State ex rel. Hughes* v. *Milhollan*, 50 N. D. 184, also relied on by the court below, did not rest on due process grounds but were concerned, rather, with determining the meaning of local law requirements for formal hearing. And compare the decision in the *Arnold* case, *supra*, with *State ex rel. School Dist. 8* v. *Cary*, 166 Wis. 103.

cedure followed by the Commission in denying respondent's petition. Certainly, in the light of this Court's statement in *Morgan* v. *United States,* 298 U. S. 468, 481, that "argument may be oral or written," there can be no basis for the reliance of the Court below on *Morgan* v. *United States,* 304 U. S. 1, for the holding that oral argument is an essential element of due process.[14]

The impact of imposing on administrative agencies a universally applicable requirement of oral hearing of testimony or argument as the only procedure which will comply with the requirements of due process, cannot be underesti-

[14] Respondent, in its opposition to the petition for a writ of certiorari in this case (pp. 17–18), attempts to distinguish those cases in which a hearing has been afforded with respect to facts before a hearing examiner. It is submitted, however, that under the doctrine of the court below such a distinction is irrelevant. For, if the opportunity to present evidence as to the facts before a hearing examiner can serve as a substitute for the opportunity to persuade the tribunal as to the law, there would appear to be no requirement for oral argument in this case, since this case presents a situation substantially identical with one in which respondent has had an opportunity to present oral testimony before a hearing examiner and the Commission has accepted respondent's view of the facts as submitted to such an examiner. The opportunity to present evidence as to the facts cannot serve as a substitute for the opportunity to persuade the tribunal as to the law. Accordingly, under the logic of the court below, an opportunity to present evidence would not satisfy the requirements created by the court below with respect to oral hearing on matters of law. Under the view of the court below, one is entitled to oral argument on matters of law whether or not one has had an opportunity to present oral testimony with respect to the facts.

mated. There are innumerable situations at the present time in which administrative agencies pass on questions of law by means of procedures other than the hearing of oral testimony and argument. See Appendix B, *infra,* pp. 61 *et seq.* Just as no blanket judgment can be made in advance of consideration of the particular facts and procedures available that all of these procedures are necessarily adequate, so it is equally impossible and undesirable to make an *a priori* judgment that all such procedures are necessarily inadequate to fulfill the requirements of due process.

It is clear from the summary set out in Appendix B that the Federal departments and administrative agencies have attempted to establish procedures best suited to particular proceedings which will provide avenues for arriving at fair determinations of the matters presented to those tribunals in such proceedings. Frequently, statutes require oral argument in specific types of administrative proceedings. See, *e. g.,* Section 409 (a) of the Communications Act. Further, administrative agencies have in general been liberal in the granting of oral argument where such argument is deemed to be fruitful to the determination of the issues involved in any proceedings. Thus, the Federal Communications Commission invariably affords oral arguments in hearings held before individual Commissioners,

even though Section 409 (a) of the Act is not applicable to such a proceeding. See, *e. g.*, Section 1.854 of the Commission's Rules and Regulations, 11 F. R. 1452, 12 F. R. 3671–3672. The Federal Communications Commission always affords oral argument in important rule-making or legislative proceedings even though no oral argument is required, and in many instances, such as with respect to procedural rules, no proposed rule-making proceedings of any kind is required. Section 4 (b) of the Administrative Procedure Act, 60 Stat. 239, 5 U. S. C. 1003 (b); compare *Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441. But administrative agencies must be given some discretion to determine when oral argument, not required by statute, will in fact be an aid to the disposition of a pending matter.

In view of the many types of administrative proceedings arising under the statutes administered by Government agencies, in some of which time is necessarily of the essence, if the public interests or the interests of regulated persons are not to be adversely affected, rigid procedural requirements suited to one type of proceeding should not be required in other types of proceedings where they might be unnecessary and even possibly unfair. Thus, even if oral argument on questions of law may be required in connection with some types of proceedings, this requirement should not be imposed rigorously and with uni-

versal application to all administrative proceedings. If the standards for administrative procedure should come to depend upon rigidly prescribed formal requirements instead of upon considerations of fairness and practicability, agencies and those having business with them would frequently be driven to follow procedures which would be wasteful of both time and manpower and would serve neither the public nor the private interests affected. Both agencies and the parties before them would be compelled to meet such rigid procedural requirements for the sole purpose of avoiding possible grounds for captious attack upon orders or rules. Such procedural provisions would furnish a weapon for destruction and delay not only to persons who may be striving to circumvent the statutes but also to obstructionists seeking to prevent agency authorization of legitimate transactions sought by other parties.

Thus if the decision of the Court of Appeals, making oral argument a matter of right, is left unimpaired, it is believed that there is danger that unsubstantial and dilatory claims may be encouraged to the point which would seriously interfere with the timely disposition of proceedings. Moreover, as the dissenting opinion notes, the question of whether opportunity for oral argument is a matter of due process is interrelated with the question of how long a period for argument constitutes due process (R. 65–66). An

arbitrary determination with respect to time allotted for oral argument would be invalid. "A rule designed to meet constitutional requirements, and effective to that purpose, would have to be phrased in terms of adequacy of presentation" (R. 66). Further, if the agency does not have the power to deny oral argument where it is deemed that such argument will not aid the dispositional processes, it is difficult to see at what point it may limit oral argument or direct counsel to confine their argument to what appear to the tribunal to be relevant issues. If possible disagreement by a reviewing court on rulings of this character is to be ground for reversal, agencies will be compelled as a matter of precaution to give more time to oral argument that they believe warranted. It is difficult to believe that curtailment of discretion in making judgments of this type by the imposition of a vigorous rule is indispensable to preserve the fairness guaranteed by the Due Process Clause.

II

THE COMMISSION'S ACTION WAS ENTIRELY PROPER ON THE FACTS IN THIS CASE AND DEPRIVED RESPONDENT OF NO RIGHTS IN CONTRAVENTION OF THE COMMUNICATIONS ACT OR THE DUE PROCESS CLAUSE

Since, as has been shown above, the Due Process Clause imposes no general and rigid requirement of oral argument which operates to invalidate the Commission's decision, we turn now to the question whether, on the facts in this case, the

Commission treated respondent with the fairness which is required by the Due Process Clause. Examination of these facts shows that the Commission gave full and fair treatment to respondent's petition, and that it properly disposed of the petition in a manner which did not deny respondent any rights under the Due Process Clause or the Communications Act of 1934.

There is no claim made here that the respondent did not have full access to the processes of the Commission, that it was not afforded a full opportunity to present its contentions in writing to the Commission,[16] or that the Commission did not give adequate consideration to these contentions. Cf. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 224–229. As the court below recognized (R. 58–59), the respondent never asked for any preliminary hearing, including oral argument, on "the question whether or not the allegations of the petition, assuming their truth, shows that WJR's license would be indirectly modified by the operation of the Coastal Plains station." We do not now quarrel with the view of the court below that if further hearing were requisite, the respondent should not have been denied it because of the inadequacy or generality of its claim to a

[16] While the Commission's Rules and Regulations do not expressly provide for the filing of briefs in support of a petition for reconsideration like that filed by the respondent, briefs are frequently filed and are always fully considered.

hearing. But the nature of its claim is nevertheless significant in answering the question whether it was accorded procedural due process. For in neither its petition to the Commission (R. 14–16) nor its notice of appeal (R. 1–6) did the respondent claim that it was unfairly treated in a procedural sense. What it in fact sought was an order directing "an immediate hearing on the question whether public interest requires operation of the Coastal Plains station at the cost of indirect modification of WJR's license" (R. 58). It did so on the theory that the Commission was wrong in holding that its allegations of modification were patently insubstantial as a matter of law; it charged not that the Commission unfairly reached that result but, rather, that it erroneously reached that result.

Respondent, as the licensee of Station WJR, Detroit, Michigan, operating as a Class I–A clear channel station on the frequency 760 kilocycles with a power of 50 kilowatts, petitioned the Commission to reconsider and set aside a grant of the application of intervenor-respondent, Coastal Plains, for a new station at Tarboro, North Carolina, operating daytime only on the 760 kilocycle channel. It based this request on two grounds. In the first place, it alleged that any action by the Commission on the Coastal Plains application during the pendency of the Commission's hearing and consideration of the Clear Channel proceed-

ing, Docket No. 6741,[16] was improper since as a result of this hearing the Commission might determine that station WJR, a clear channel station, could be granted increased power or additional protection to its present service area over and beyond the protection afforded by existing Commission rules. A grant of the Coastal Plains application, it was alleged, would prejudice any such determination in the Clear Channel hearing and, therefore, the respondent requested that the grant be set aside and the application be held in abeyance until after decision in the Clear Channel case. The respondent alleged as its second ground that the operation of the Coastal Plains station would cause objectionable interference to the existing service area of station WJR and would thereby deprive a number of listeners of WJR service. This allegation was accompanied by an affidavit by a qualified engineer setting forth the extent of the interference which it was calculated the operation of the Coastal Plains station in Tarboro would cause to WJR. On the basis of that alleged interference, the petition requested that the Commission set aside the grant to Coastal Plains and designate its application for hearing,

[16] The Clear Channel hearing (Docket No. 6741) is a pending rule-making proceeding to determine whether changes in the rules governing assignment of stations on clear channels should be adopted. Among the issues in this proceeding is the question whether the maximum authorized power of Class I-A stations should be increased (R. 7).

with WJR as a party, to determine whether any grant of the Coastal Plains application which would result in such interference would be in the public interest.

An opposition to this petition was filed by Coastal Plains on October 18, 1946, together with an accompanying affidavit by its consulting engineer (R. 19–21). No reply to this opposition was filed by respondent.[17] After study of the pleadings, the Commission, on December 17, 1946, adopted and issued its decision and order denying the petition. This opinion was based on an assumption of the truth of the facts as alleged by the petitioner with respect to both the pending Clear Channel proceeding and the alleged interference which would be caused to its service by the operation of the Coastal Plains station. Accordingly, no question is presented here with respect to procedures that must be followed under the Due Process Clause with respect to the resolution of questions of fact. The Commission determined, however, that the facts alleged by the petitioner stated no valid legal grounds for granting the petition. It stated that the alleged interference to the WJR service, upon which appel-

[17] The Commission's Rules and Regulations do not expressly provide for the filing and consideration of replies to oppositions, but such replies are in fact frequently filed by the party making the original request, and in all such cases are fully considered by the Commission before it reaches any determination on the matter.

lant's request that the Coastal Plains application be designated for hearing was grounded, occurred in an area, outside the normally protected contours of station WJR, in which appellant was not entitled to protection from interference of other stations, and that therefore no grounds existed for designating the application for hearing with WJR as a party to determine the scope and extent of the alleged interference or whether as a consequence of such interference, the grant would be in the public interest. And, with respect to the respondent's contention that action on the Coastal Plains application should be delayed until the conclusion of the Clear Channel case, the Commission stated that it would not be in the public interest to set aside the grant and withhold action on an application which complied in every respect with the rules and regulations of the Commission because of the speculative possibility that the grant might affect the future assignment of facilities to WJR if the eventual decision on the Clear Channel proceeding resulted in a decision favorable to the respondent's claims (R. 26).

The court below agrees that the principal question with respect to the merits of respondent's claim of interference is whether or not respondent has suffered a modification of its license under the provisions of Section 312 (b) by reason of the grant to Coastal Plains (R. 42–43). Further, it agrees that in view of the decision of this Court in *Federal Communications Commission* v. *Na-*

tional Broadcasting Company (*KOA*), 319 U. S. 239, "this is a question of law to be answered in terms of the Communications Act, the Commission's rules and standards, and pertinent judicial decisions" (R. 42). The decision of this Court in that case makes clear that the rights created by the grant of a license are defined by the rules and standards of the Commission which are substantially incorporated in the license.[18]

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[18] Any view that a hearing is required even though WJR is not entitled by the Commission's Rules and Regulations to protection from the interference it alleges, would impede the orderly exercise of the Commission's licensing functions under the Communications Act and the *KOA* decision, *supra*, 319 U. S. 239. For, since the signal of every station inevitably suffers some interference from the signals of other stations on the same and adjacent frequencies (see *National Broadcasting Company* v. *Federal Communications Commission*, 132 F. 2d 545, 548 (C. A. D. C.), affirmed, 319 U. S. 239), some rules are necessary to determine the kind of service which is of such poor quality as to warrant its disregard by the Commission in passing upon radio license applications. There are at present over 1,000 standard broadcast stations, and almost every new application for a station raises the possibility of some interference to the signal of an existing station. If the possibility of the existence of interference to the signal of an existing station, regardless of the quality and intensity of the signal, were held to be the basis of a right to a statutory hearing, it would result in an improper curtailment of the authority conferred on the Commission by Section 303 (f) of the Act to "make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act." These regulations would thus be denied relevance and applicability to the Commission's licensing functions. This would produce an utterly formless and indefinite standard, thus placing a difficult burden on the Commission and the courts in de-

The *KOA* case thus establishes that WJR is entitled to protection solely against Commission action resulting in objectionable interference under the rules. But when the Commission's Rules and Regulations are examined, it becomes apparent that the interference to the WJR service, alleged by respondent's petition, is not interference to any service which is afforded protection.

In the exercise of the rule-making powers conferred on the Commission by Section 303 (a), (b), (c), (d) and (f) of the Act, the Commission has, in Section 3.22 of its Rules, specified the classes and power of standard broadcast stations; in Section 3.21 of the Rules, specified the classes of standard broadcast channels; in Section 3.23 of the Rules, specified the time of operation of the several classes of stations; and in Section 3.25 of the Rules, designated particular frequencies as clear channels, to which Class I and Class II stations may be assigned. (See Appendix A, *infra*, pp. 49–50, 56–58).

Section 3.25 (a) of the Rules designates the frequency 760 kilocycles, on which WJR is located, as a channel on which there may be assigned one Class I station and one or more Class II stations operating limited time or daytime only.

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termining, from case to case, what rights of a licensee are entitled to protection. These considerations serve to emphasize the wisdom of the decision of this Court in the *KOA* case that the Rules and Standards are to serve as the measure for determining whether an existing station is entitled to a hearing by reason of interference to its signal.

Section 3.28 (a) of the Rules provides that the individual assignment of stations to channels which may cause interference to other United States stations shall only be made in accordance with the Commission's *Standards of Good Engineering Practice Concerning Standard Broadcast Stations* for the respective class of stations involved (see Appendix A, *infra*, pp. 58-59). While Sections 3.21 and 3.22 of the Rules provide that the primary or daytime groundwave service of a Class I station shall be free from objectionable interference, Section 3.22 makes clear that this protection shall be afforded in accordance with the *Standards*.

The *Standards* state expressly that "during daytime the Class I station is protected to the 100 uv/m ground wave contour".[19] (See Appendix A, *infra*, pp. 59–60). That this is the maximum protection afforded is further established by Table IV of the *Standards of Good Engineering Practice*

[19] This determination that protection for Class I stations beyond the 100 microvolts per meter contour would not be in the public interest was made in 1939 after a formal hearing from June 6 to June 30, 1938, and an informal hearing from June 5 to June 6, 1939, at which 45 representatives of broadcast equipment manufacturers, networks, broadcast associations and consulting engineers were present. *Fifth Annual Report of the Federal Communications Commission* (1939) pp. 37–42. The social, economic, and engineering problems in connection with that determination were considered at great length. *Report on Proposed Rules Governing Standard Broadcast Stations and Standards of Good Engineering*, Docket No. 5072A, dated January 18, 1939.

Concerning Standard Broadcast Stations. But no interference within the 100 microvolt contour of WJR will result from the operation of Coastal Plains. On the contrary, in an engineering affidavit filed with its petition for Reconsideration and Hearing before the Commission, the respondent admitted that in the area in which it claims interference, WJR lays down a signal averaging only 32 microvolts per meter or less during daytime hours (R. 17).

Thus the Standards make clear that WJR is not entitled to protection against the interference it alleges will be caused to its groundwave signal in the daytime by reason of the operation of Coastal Plains.

The Commission's Rules (1.382, 1.390, Appendix A, *infra*, pp. 53, 54–56), governing grants without hearing and designation of applications for hearing, reveal that an existing station is not entitled to a hearing on a new application where it alleges that a grant of that application would cause interference to it outside its normally protected contour, as prescribed by the applicable Rules. But that is exactly what respondent alleged in its petition for rehearing of the Coastal Plains grant. Under these circumstances if respondent had been afforded oral argument, the only significant contentions it could have made were either that the facts are otherwise than as alleged in its pleading or

that the rules and *Standards* do not mean what they so obviously say.[20] But it is no denial of due process for the Commission to take at face value a party's own pleadings and the well-established meaning of its rules.[21] The Commission, therefore, in disposing of respondent's petition, said (R. 26):

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[20] See *Marysville-Yuba City Broadcasters, Inc.*, 8 F. C. C. 83 (1940); cf. *Wescoast Broadcasting Company (KPQ)*, 9 F. C. C. 50 (1941); *Queen City Broadcasting Co., Inc.* (decided Dec. 16, 1946), 3 Pike and Fischer *Radio Regulation*, p. 657.

[21] In his dissent, Judge Prettyman observes (R. 66–67):

"The point upon which we [the minority] differ is elusive and difficult to pin down, but it is exceedingly simple. Perhaps if we visualize a proceeding we will make it clear. A case to which A and B are parties is pending before some tribunal. An outsider, M, appears and files a paper in which he asks to be made a party. But he does not allege any fact which shows that he has any interest in the case, or that he would be affected by it, or even raises any substantial question in that respect. My view is that such an unsupported request can be denied without an oral argument. The court says that the Constitution requires that he have oral argument, in order that he may have a chance to persuade the tribunal that he has an interest despite his allegations. In its practical effect, the court requires that every petition for intervention be set for oral hearing, no matter what the petition says or fails to say. I say that tribunals have some measure of leeway to dispose of such petitions without hearing, if they do not even raise a substantial question as to the petitioner's interest. In its theoretical concept, the court seems to hold that the Constitution protects all pleaders against stupidity, laziness or ineptness with the written word. My view is that the Constitution requires him who wants to participate in a pending case to exert at least a modicum of effort and to indicate in writing at least some shadow of factual ground for his prayer."

> Station WJR is a Class I–A station. Under the Commission's Rules and Standards, Class I–A stations are normally protected daytime to the 100 microvolt-per-meter contour. The area sought by petitioner to be protected is, according to the engineering affidavit accompanying the petition, served by Station WJR during the daytime with a signal intensity of 32 microvolts-per-meter or less, and is therefore outside the normally protected contour.

Under these circumstances, since no interest of WJR entitled to protection was affected by the grant to Coastal Plains, respondent's request for a statutory hearing was completely and patently without merit.

Despite its enunciation of general principles as to the necessity for oral argument on all legal issues presented for decision by an agency, the court below was able both to pass on and uphold on its merits the Commission's disposition of the respondent's request that action on the Coastal Plains application be deferred altogether until after a decision in the Clear Channel hearing (R. 41). Yet no oral argument had been held on that claim.

The fact that the Commission's denial of respondent's request based on the interference ground was a final disposition of that claim as a result of which respondent was "disabled on the merits to proceed further" before the Commission (R. 50) no more presents due process difficulties than does

the denial of respondent's request based on the Clear Channel hearing ground. For respondent was able to present the one determination as well as the other for the examination of a reviewing court by availing itself of the judicial review provisions of Section 402 (b) of the Communications Act. This availability of judicial review affords a safeguard, sufficient for constitutional purposes, against a possibly erroneous interpretation of the statute and the rules and regulations. Cf. *Bowles* v. *Willingham,* 321 U. S. 503, 520; *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 189; *Phillips* v. *Commissioner,* 283 U. S. 589, 596–599; *Nickey* v. *Mississippi,* 292 U. S. 393, 396; *Security Trust Co.* v. *Lexington,* 203 U. S. 323, 333. And the decision of the court below on the untenability of respondent's claim based on the pendency of the Clear Channel hearing is itself illustrative of the manner in which judicial review may be available where an agency rejects a claim for relief as entirely unwarranted as a matter of law.

An explanation which finds confirmation in the opinion below discloses the reason for the fact that while the lack of oral argument offered no barrier to decision by the court below on the Clear Channel claim of respondent and its denial by the Commission, the court found that, although, following the same procedure, the Commission could not deny the claim that, because of interference to it, the Coastal grant should be set aside and the application set down for a full hearing in which it

could participate. This explanation is that the court below had been able to reach the conclusion that respondent's interest as a future applicant for increased power was not such a substantial interest that the Due Process Clause requires an oral hearing on a claim of impairment of that interest; but that respondent's interest as an existing licensee was so substantial an interest that the Due Process Clause required such a hearing on a claim of interference with that interest. This second proposition is, indeed, expressly stated in the opinion below. The first is not spelled out, but is implicit in the discussion in Point I of the opinion (R. 41). If this explanation for the court's ability to pass on the merits of the Clear Channel issue is correct, it is obvious enough that by its own actions the court below, while stating otherwise, is implicitly agreeing that some issues may be disposed of without prior oral argument, and that request for relief may in particular circumstances be denied because the interest asserted and the claim for protection to it are found to be too flimsy to warrant the affording of the relief sought.

The court below did not hold that respondent was entitled to the hearing provided by Section 312 (b) on whether its license should be modified. It held that respondent was entitled to a preliminary hearing on the question whether the allegations of its petition showed, as a matter of

law, that the proposed action of the Commission would constitute a modification of respondent's license requiring a prior hearing under Section 312 (b). It held that respondent was entitled to such a preliminary hearing even in the absence of an allegation of interference within the normally protected contour of respondent. In holding that, under these circumstances, respondent was entitled to such a preliminary hearing, the court has in effect held that because of the nature of the interest asserted, any claim of "interference" with that interest requires the holding of a hearing to ascertain the substantiality of the claim. But in equating electrical interference as such, even where it occurs outside of protected contours, with impairment of the rights in a license, the court below looks to sources other than the applicable provisions of the Communications Act and the Commission's Rules and Standards as the measure of the nature and extent of the rights conferred by a radio station license and the protection which they are afforded. For, it has broadly assumed that a radio station license confers a property right in its owner, that "the impairment of such a license right by the granting of conflicting facilities to another station is therefore *pro tanto* a deprivation of property" (R. 46), and that for this reason the Due Process

Clause requires a hearing.[22] However, the use of an undefined concept of "property" rights in a license and of "conflict" with these rights by electrical interference from a new station in areas outside the protected contours of the existing station serves to obliterate existing law as to the nature and extent of the rights conferred

[22] These views were reiterated in the decision below in the terms in which they were stated by the same court in the case of *L. B. Wilson* v. *Federal Communications Commission*, 170 F. 2d 793, 802 (C. A. D. C.), where the court stated: "As has been said above, a broadcasting license confers a property right on its owner, although a limited and defeasible one. The impairment of such a right by the granting of conflicting facilities to another station is, therefore, *pro tanto* a deprivation of property. The due process clause of the Fifth Amendment provides that no person shall be deprived of life, liberty or property without due process of law. An essential element of due process is an opportunity to be heard before the reaching of a judgment."

In the *Wilson* case these views were not necessary for the decision. For, in that case, as well as the companion case of *WJR* v. *Federal Communications Commission* (*Southeastern Broadcasting Co., Intervenor*), (C. A. D. C.), decided October 7, 1948, 4 Pike and Fischer, *Radio Regulation*, p. 2081, which were reargued together with the instant case in the court below on June 11 and 12, 1947, the interference to the existing licensees, which it was alleged would result from the new grants, was within the normally protected contours of the existing stations as defined by the Commission's Rules and Standards. And, therefore, on the basis of the factual allegations of "objectionable interference" within protected contours, the licensees were entitled to a hearing under the ruling of this Court in *Federal Communications Commission* v. *National Broadcasting Company* (*KOA*), 319 U. S. 239.

by a license, found in the Communications Act and decisions of this Court, and to substitute for it concepts which have been rejected by this Court. The Communications Act of 1934 and decisions of this Court make it clear that the grant of a license does not confer rights of property in a licensee.[23] Moreover, vague and undefined use of the term "conflict" serves to substitute ambiguities of undefined language for the provisions of Section 312 (b) of the Communications Act, the Rules and Standards promulgated by the Commission, and the decision of this Court in the case of *Federal Communications Commission* v. *National Broadcasting Company (KOA)*, 319 U. S. 239, as the measure of the rights of an existing licensee and the extent of protection against threatened impairment.

The real issue in this case is whether the respondent was accorded a fair opportunity to present its position to the Commission. The respondent did not complain of unfairness and his substantive claim, as we have shown, may fairly be characterized as frivolous. The dissenters below correctly and explicitly ruled that the respond-

[23] See Sections 301, 304, 307 (d), and 309 (b) of the Communications Act. *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U. S. 327, 331; *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 475: "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."

ent's contentions were entirely unsubstantial and that the Commission did all that it was required to do under the circumstances. Their view and the Government's is that the hearing required by the Due Process Clause is only such as is "appropriate to the nature of the case upon which such officers are required to act." *The Japanese Immigrant Case*, 189 U. S. 86, 101. In this case, the hearing accorded the respondent was adequate in the face of its frivolous claim.

The fact that the provisions of the Communications Act, the Rules and Standards of the Commission, and prior relevant decisions of this Court must be consulted in order to determine the unsubstantiality of respondent's petition in the light of the undisputed facts which it presents, does not of itself require that the Commission must hold an oral argument in order to ensure that these processes of legal reasoning are adequately performed. What can be clearly read and interpreted is not rendered doubtful or obscure by the fact that it takes time to read the relevant material or that it may require the cross-referencing of that material to give it full meaning and significance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.
STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.
BENEDICT P. COTTONE,
General Counsel,
MAX GOLDMAN,
Assistant General Counsel,
RICHARD A. SOLOMON,
PAUL DOBIN,
Counsel,
Federal Communications Commission.

APRIL, 1949.

APPENDIX B

There is set out in full in this Appendix the correspondence between the Solicitor General and various Governmental agencies with respect to the decision of the Court below in this case.

1. The letter of the Solicitor General, dated February 3, 1949, is as follows:

> On October 7, 1948, the Court of Appeals for the District of Columbia rendered a decision in the case of *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission,* setting aside an order of the Federal Communications Commission on the ground that it had not afforded the petitioner a fair hearing. The Federal Communications Commission had without argument dismissed a petition for relief because on its face the petition shows that it did not state grounds for relief under the governing regulation. The Court of Appeals held, however, that
>
> "due process of law, as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite,* for temporary injunctions and the like."
>
> In view of the importance of the decision in imposing a constitutional requirement that oral argument be held on questions of law, irrespective of how meritless an application might be on its face, before an agency disposes of pending proceedings on

831293—49——5

the basis of the resolution of such issues of law, the Government has filed a petition for writ of certiorari in this case. A copy of the opinion and the Government's petition are enclosed.

The case is obviously important for all administrative agencies. It would be most helpful in the preparation of the Government's brief if you would advise us of the practice of your agency in similar situations, and of the potential effect of the decision of the Court of Appeals upon your agency. In particular, does the agency dismiss petitions or applications insufficient on their face as a matter of law without allowing oral argument? If so, does it permit the filing of briefs in support of the petition or application before the dismissal? If so, does it do this by specific rule or regulation or just as a matter of practice? Would requiring argument on such petitions or applications impose any substantial burden upon the agency or impede the performance of its duties?

I would appreciate a statement from you as to these matters as promptly as possible.

Sincerely yours,

PHILIP B. PERLMAN,
Solicitor General.

2. The following replies were received:

UNITED STATES DEPARTMENT
OF AGRICULTURE,
OFFICE OF THE SOLICITOR,
Washington, D. C., Mar. 7, 1949.

The Solicitor General,
Department of Justice.

DEAR MR. SOLICITOR GENERAL: This is in reply to your letter of February 3, 1949, in which you

APPENDIX A

COMMUNICATIONS ACT OF 1934, 48 STAT. 1064, AS AMENDED, 47 U. S. C. 151, ET SEQ.

Title III—Special Provisions Relating to Radio

License for Radio Communication or Transmission of Energy

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or singals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or

refer to the recent decision of the Circuit Court of Appeals for the District of Columbia in the case of *WJR, the Goodwill Station, Inc.* v. *Federal Communications Commission*, reserving an order of the Commission on the ground that the petitioner had not been granted a fair hearing. It appears that the Commission, without hearing argument, dismissed the appellant's petition because it did not, on its face, contain allegations which would entitle the petitioner to the relief sought. The court held that the failure to grant the petitioner an opportunity to present oral argument on the question of whether the petition was legally sufficient constituted a denial of due process of law.

You desire to know (1) whether this Department dismisses petitions or applications which it deems legally insufficient without allowing oral argument, (2) whether, in such cases, we permit the filing of briefs in support of the petition or application, (3) whether our procedure in these respects is governed by specific rules or is a matter of departmental practice, and (4) whether a requirement that oral argument be permitted on all such petitions or applications would impose any substantial burden upon this Department or impede the performance of its duties.

As you are doubtless aware, there are numerous statutes administered by this Department under which administrative proceedings are authorized. The decision in the *Goodwill Station* case arose out of a petition for intervention in a proceeding whereby a third party sought and had been granted a license to construct a broadcasting station. Analogous situations might arise in this Department under applications to amend rates under the Packers and Stockyards Act,[1] petitions by milk handlers to modify or be exempt from orders issued under the Agricultural Marketing

[1] 7 U. S. C. 181–231.

when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

General Powers of Commission

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the pro-

visions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with.

* * * * * *

Waiver by Licensee

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

* * * * * *

Allocation of Facilities; Term of Licenses

SEC. 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to

the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

* * * * * *

Hearings on Applications for Licenses; Form of Licenses; Conditions Attached to Licenses

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

* * * * * *

Revocation of Licenses

SEC. 312. (b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

* * * * * *

Proceedings to Enforce or Set Aside the Commission's Orders—Appeal in Certain Cases

SEC. 402. (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

SEC. 1.382. *Grants without a hearing.*—(a) Where an application for radio facilities is proper upon its face and where it appears from an examination of the application and supporting data that (*a*) the applicant is legally, technically and financially qualified; (*b*) a grant of the application would not involve modification, revocation, or non-renewal of any existing license or outstanding construction permit; (*c*) a grant of the application would not cause additional electrical interference to an existing station or station for which a construction permit is outstanding within it normally protected contour as prescribed by the applicable Rules and Regulations; (*d*) a grant of the application would not preclude the grant of any mutually exclusive application; and (*e*) a grant of the application would be in the public interest, the Commission will grant the application without a hearing.

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the Commission will not consider any other application as being mutually exclusive with the application under consideration unless such other application was substantially complete and was tendered for filing with the Commission not later than the close of business on the day preceding the day on which the Commission takes action with respect to the application under consideration [11 F. R. 891, 177A–416, 13974; 13 F. R. 660].

SEC. 1.390. *Petitions for reconsideration or for rehearing.*—(a) Where an application has been granted without a hearing, any person aggrieved or whose interests would be adversely affected thereby may file a petition for reconsideration of such action. Such petition must be filed with the Commission within 20 days after public notice is given of the Commission's action in granting the application. Such petition will be granted if the petitioner shows that:

(1) Petitioner is an existing licensee or permittee and a grant of the application would require the modification, revocation, or non-renewal of his license or construction permit; or

(2) That petitioner is an existing licensee or permittee and a grant of the application would cause interference to his station within the normally protected contour as prescribed by applicable Rules and Regulations; or

(3) At the time the application was granted, petitioner had a mutually exclusive application pending before the Commission; or

(4) A grant of the application is not in the public interest.

(b) Where an application has been granted or denied after hearing, petitions for rehearing may be filed within 20 days after public notice is given of the Commission's action in granting or denying the application. Petitions for rehearing by persons not parties to the Commission's hearing will not be granted unless good cause is shown as to why it was not possible for such person to participate earlier in the Commission's proceeding.

(c) Where a petition for reconsideration or for rehearing is based upon a claim of electrical interference within the normally protected contour of an existing station or a station for which a construction permit is outstanding, such petition must be accompanied by an affidavit of a qualified radio engineer which shall show either by reference to the Commission's Standards of Good Engineering Practice or to actual measurements made in accordance with the methods prescribed by the Commission's Standards of Good Engineering Practice that electrical interference will be caused to the station within its normally protected contour. If the claim of interference is not based upon actual measurements made in accordance with the Standards of Good Engineering Practice, it may be controverted by affidavit containing results of actual measurements made in accordance with the Standards of Good Engineering Practice.

(d) Any opposition to a petition for reconsideration or rehearing may be filed within 10 days after the filing of such petition.

(e) Petitions for reconsideration or rehearing filed under this section may request (1) reconsideration, either in cases decided after hearing or

in cases of applications granted without hearing; (2) reargument; (3) reopening of the proceeding; (4) amendment of any finding; or (5) such other relief as may be appropriate. Such petition shall state specifically the form of relief sought and, subject to this requirement, may contain alternative requests. Each such petition shall state with particularity in what respect the decision, order or requirement or any matter determined therein is claimed to be unjust, unwarranted, or erroneous, and with respect to any finding of fact must specify the pages of record relied on. Where the petition is based upon a claim of newly discovered evidence, it must be accompanied by a verified statement of the facts relied upon, together with the facts relied on to show that the petitioner, with due diligence, could not have known or discovered such facts at the time of the hearing.

(f) The filing of a petition for reconsideration or rehearing shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof. However, upon good cause shown the Commission may stay the effectiveness of its order or requirement pending a decision on the petition for rehearing. [11 F. R. 177A–417.]

* * * * * *

SEC. 3.21. *Three classes of standard broadcast channel.*—(a) *Clear Channel.*—A "clear channel" is one on which the dominant station or stations render service over wide areas and which are cleared of objectionable interference, within their

primary service areas and over all or a substantial portion of their secondary service areas. [4 F. R. 2715.]

* * * * *

SEC. 3.22. *Classes and power of standard broadcast stations.*—(a) *Class I station.*—A "Class I Station" is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in Sec. 3.25 or in accordance with the "Engineering Standards of Allocation." The operating power shall be not less than 10 kw nor more than 50 kw (also see Sec. 3.25 (a) for further power limitation).

(b) Class II station. A "Class II Station" is a secondary station which operates on a clear channel (see Sec. 3.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations. A station of this class shall operate with power not less than 0.25 kilowatts nor more than 50 kilowatts. Whenever necessary a Class II station shall use a directional antenna or other means to avoid interference with Class I stations and with other Class II stations, in accordance with the "Engineering Standards of Allocation." [4 F. R. 2715.]

* * * * *

SEC. 3.23 *Time of operation of the several classes of stations.*—The several classes of standard broadcast stations may be licensed to operate in accordance with the following:

(*a*) "Unlimited time" permits operation without a maximum limit as to time.

(*b*) "Limited time" is applicable to Class II (secondary stations) operating on a clear channel only. It permits operation of the secondary station during daytime, and until local sunset if located west of the dominant station on the channel, or if located east thereof, until sunset at the dominant station, and in addition during night hours, if any, not used by the dominant station or stations on the channel. [4 F. R. 2716.]

* * * * *

SEC. 3.25 *Clear Channels; Class I and II stations.*—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

(*a*) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 750, 760, 770, 780, 820, 830, 840, 870, 880, 890, 1020, 1040, 1100, 1120, 1160, 1180, 1200, and 1210 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kilowatts. [4 F. R. 2716, 5 F. R. 3670, 6 F. R. 2544.]

* * * * *

SEC. 3.28 *Assignment of station to channels.*—(a) The individual assignments of stations to channels which may cause interference to other

United States stations only, shall be made in accordance with the standards of good engineering practice prescribed and published from time to time by the Commission for the respective classes of stations involved. (For determining objectionable interference see "Engineering Standards of Allocation" and "Field Intensity Measurements in Allocation," Sec. C.) [4 F. R. 2716, 5 F. R. 3670.]

* * * * * *

STANDARDS OF GOOD ENGINEERING PRACTICE CONCERNING STANDARD BROADCAST STATIONS (550–1600 KC)

(4 F. R. 2862)

* * * * * *

1. Engineering Standards of Allocation.

* * * * * *

(2) From an engineering point of view, Class I stations may be divided into two groups:

(*a*) The Class I stations in Group I are those assigned to the channels allocated by Section 3.25, paragraph (*a*), on which duplicate nighttime operation is not permitted, that is, no other station is permitted to operate on a channel with a Class I station of this group within the limits of the United States (the Class II stations assigned the channels operate limited time or daytime only), and during daytime the Class I station is protected to the 100 uv/m ground wave contour. Protection is given this class of station to the 500 uv/m ground wave contour from adjacent channel stations for both day and nighttime operations.[1] The power of each Class I station shall not be less that 50 kw.

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[1] See Tables IV and V.

* * * * * *

Extracts from Table IV (4 F. R. 2865)—Protected service contours and permissible interference signals for broadcast stations

Class of Station	Class of channel used	Permissible power	Signal intensity contour of area protected from objectionable interference [1]		Permissible interference signal [2] on same channel	
			Day [3]	Night	Day [3]	Night [4]
Ia	Clear	50 kw	SC 100 uv/m AC 500 uv/m	Not duplicated	5 uv/m	Not duplicated

[1] When it is shown that primary service is rendered by any of the above classes of stations, beyond the normally protected contour, and when primary service to approximately 90 percent of the population (population served with adequate signal) of the area between the normally protected contour and the contour to which such station actually serves, is not supplied by any other station or stations, the controur to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration. When a station is already limited by interference from other stations to a contour of higher value than that normally protected for its class, this contour shall be the established standard for such station with respect to interference from all other stations.

[2] For adjacent channels see Table II.

[3] Groundwave.

[4] Skywave field intensity for 10 percent or more of the time.

Agreement Act,[2] complaints under the Commodity Exchange Act[3] whereby a contract market seeks to exclude a cooperative association from membership in such market, and petitions by third parties to intervene in any such proceedings or in disciplinary (accusatory) proceedings under the Commodity Exchange Act, the Packers and Stockyards Act, the Perishable Agricultural Commodities Act,[4] and various other acts.

1. While this Department generally grants a request for oral argument in support of a petition, application or complaint in any of the above described situations, such petitions, applications, or complaints are, upon occasion, dismissed without permitting oral argument. Such dismissals are based upon a determination that the pleading is legally insufficient, upon its face, to entitle the petitioner to the requested relief.

2. A request that the petitioner be allowed to file a brief in support of his pleading is also generally allowed. However, the petition or application may be and sometimes is dismissed or decided adversely to the petitioner, on the ground of legal insufficiency, without either brief or oral argument, except in proceedings under the Agricultural Marketing Agreement Act as above described, where the rules require that the petitioner be notified of the Government's intention to dismiss and be given an opportunity to file a memorandum of law in support of his petition.

3. As above indicated, our rules of practice make no provision for oral argument or, with the single exception above noted, for the submission of briefs in support of any petition, application or complaint in the above described cases. The granting of requests to brief and argue such

[2] 7 U. S. C. 601 *et seq.*

[3] 7 U. S. C. 1–17a.

[4] 7 U. S. C. 499a–499r.

petitions or motions is, accordingly, a matter of practice rather than requirement.

The situations above described are those most closely analogous to the facts before the court in the *Goodwill Station* case. These are situations wherein private persons seek to initiate action before a Government body in an effort to obtain some right or privilege. However, the court's language, as exemplified by the quoted portion thereof in your letter, would seem to be sufficiently broad to encompass the reverse situation—where the Government is taking the initiative in an effort to deprive a person of some right or privilege. So interpreted, the court's decision would apply to any motion by a respondent to dismiss a proceeding on the ground that a complaint issued by this Department does not state a cause of action. Our practice with respect to such motions then becomes pertinent to your inquiry.

This Department generally grants a request for oral argument or to permit the filing of briefs in support of a motion to dismiss a complaint. However, such motions may be and sometimes are dismissed without permitting either oral argument or the filing of briefs, upon a determination by the hearing examiner that the motion discloses no basis in law for the relief asked by the moving party. The rules of practice provide that a respondent or party may, at his option, present briefs and argue orally at some stage prior to the final determination of the proceeding. Generally, this requirement is reflected in a provision that briefs and oral argument be permitted in support of exceptions to the report of the hearing officer. There is no right under these rules to submit briefs or argue at any particular stage prior to final determination, in support of any such motion.[5] On the contrary, the rules

[5] In a decision and order entered February 2, 1949, with reference to certain questions certified by the hearing officer, the

state specifically that the hearing officer may refuse oral argument on any point if such refusal will not deprive the party of an opportunity to argue orally later in the proceeding.

4. If the requirement that oral argument must be permitted relates only to petitions or applications the denial of which will result in dismissal of the case or exclusion of the petitioner as a participant, it is the opinion of this Department that such requirement would not impose a substantial burden, although it would undoubtedly result in some increase in the volume of work and in the time necessary for the disposition of proceedings. We have encountered little difficulty heretofore as a result of our liberal policy with respect to the granting of oral argument on such petitions, probably because of the fact that petitioners know that the granting of such requests is discretionary, and are therefore inclined to present them only when a reasonable basis exists. If oral argument were made a matter of right, without any necessity for the requesting party to show a reasonable basis, we believe that the number of such requests would increase considerably. In addition, there is a very real likelihood that such a requirement would, in some cases, be used as a delaying tactic. In such situations it would result in preventing prompt disposition of the proceeding.

If the requirement that oral argument must be permitted relates to all motions, petitions or applications other than those of an interlocutory nature, it is the opinion of this Department that

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Judicial Officer of the Department, acting for the Secretary, held that "It does not appear to be a requirement of due process of law under the Fifth Amendment that a respondent in an administrative proceeding be afforded an opportunity to test the validity of a complaint and to get a decision upon the validity prior to a hearing upon the merits."

the requirement would open a fertile field for unjustifiable delay, impose a substantial burden upon the Department, and impede the Department in the performance of its duties.

Sincerely yours,

W. CARROLL HUNTER,
Solicitor.

UNITED STATES
DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington 25, D. C., Feb. 9, 1949.

Hon. PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

DEAR MR. PERLMAN: This responds to your letter of February 3 concerning the case of *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission* (D. J. File No. 82–38).

As the Department of the Interior is not, generally speaking, a regulatory agency, the impact of the decision rendered in this case by the United States Court of Appeals, District of Columbia Circuit, would be less serious upon the operations of this Department than upon the operations of agencies whose work is wholly or largely regulatory in character. However, there are two classes of proceedings in the Department of the Interior which seem to be within the ambit of this decision. I refer to contests over interests in the public lands of the United States and to Indian probate proceedings.

The departmental regulations governing the conduct of public-land contests are found in 43 CFR, Part 221. The particular point involved in the *WJR* case might arise in one of these pro-

ceedings as a result of the disposition without a hearing of an application to institute a contest (see 43 CFR 221.1–221.5 of or a motion for a new trial (see 43 CFR 221.42–221.45). It is customary for such an application or motion to be denied without a hearing when it shows plainly on its face that the person submitting the application or motion does not have a legal basis for the relief sought by him.

The departmental regulations governing Indian probate proceedings are set forth in 25 CFR, 1947 Supp., Part 81. The point involved in the *WJR* case might arise in connection with one of these proceedings upon the disposition without a hearing of a petition for rehearing (see 25 CFR, 1947 Supp., 81.17) or for reopening (see 25 CFR, 1947 Supp., 81.18). It is not customary to grant a hearing on a petition which fails to allege adequate grounds for the relief sought by the petitioner.

Proceedings of the two classes mentioned above are rather numerous (although in the over-all picture they constitute a relatively small part of the work of the Department of the Interior as a whole). Because of the chronic shortage of personnel which has long plagued this Department, only small staffs are available to handle these proceedings, and delays in the disposition of the cases are all too common. If it were established as a principle of constitutional law that each person who submits an application to contest or a motion for new trial or a petition for rehearing or reopening must be granted a hearing, irrespective of the deficiencies of the application or motion or petition, the adverse effect upon the small number of personnel handling these types of proceedings would be serious. It would certainly be necessary for the Congress to provide funds with

which to enlarge the small staffs engaged in these lines of work.

Sincerely yours.

Mastin G. White,
MASTIN G. WHITE,
Solicitor.

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHIEF COUNSEL,
Washington 25, February 11, 1949.

Honorable PHILIP B. PERLMAN,
Solicitor General, Department of Justice,
Washington 25, D. C.

MY DEAR MR. SOLICITOR GENERAL: I have your letter of February 3, 1949, in reference to petition for writ of certiorari to the Court of Appeals of the District of Columbia in *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission.* I have read the decision of the Court and the accompanying petition, both of which you enclosed with your letter.

Judge Stephens' opinion has a broad sweep and will undoubtedly slow down the functioning of the Interstate Commerce Commission if it is to be required in every adversary proceeding, to accord parties the right to oral argument as an indispensable ingredient of due process.

You inquire (1) of the practice of the agency in similar situations; (2) the potential effect of the decision upon this agency.

As to (1), I am unable to point out any practice under the Interstate Commerce Act which might be said to parallel the facts upon which the Court of Appeals' decision is based. It has been the almost invariable practice of this Commission in proceedings of any importance to accord to the parties opportunity to present their contentions either by way of adduction of testimony or the presentation of argument. Of course many

so-called formal cases are submitted to the Commission upon briefs alone, nevertheless when request has been made for oral argument either before a division or the Commission as a whole such request is granted. Our rules of practice do not specifically provide for rulings on questions raised by way of demurrer or as if on demurrer.

On the other hand the broad basis upon which the decision rests might bring into question the practice of this agency in administering several sections of its organic law. Those sections of the Interstate Commerce Act dealing with the filing of complaints, sections 13 (1), 204 (e), 304 (e), 406 (a), provide that the Commission shall investigate the matters complained of "if there shall appear any reasonable ground for investigating said complaint" (Sec. 13 (1), 406 (a), or if "the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint" (Sec 204 (a), 304 (e)). It would appear that before the Commission's machinery is set in motion it must determine preliminarily that the complaint alleges reasonable grounds. While I cannot refer you to any particular case where the Commission has dismissed a complaint at this preliminary stage it would obviously place a severe burden on it to have to accord oral argument upon the question of whether a complaint states reasonable ground for relief. In any event a complainant has protection from arbitrary action by way of judicial review.

There are a great many matters both ex parte and adversary which the Commission determines without recourse to formal hearing, briefs or oral argument.

Many 4th section cases (long and short-haul clause) are decided upon petition and protest. Only those cases which are of such importance

or difficulty as to require formal hearing are so treated.

In section 5 cases (combinations and consolidations of carriers) public hearing is required by the Act only in cases where railroads are involved or "if the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made." Many cases of this kind are decided in the face of formal protest, without hearing or oral argument. The same situation obtains with respect to applications for approval of the issuance of securities or assumption of indebtedness (section 20a).

Sections 206 (b), 209 (b), 309 (a) (g), 410 (c), dealing with the issuance of certificates of public convenience and necessity, and permits, do not require hearing. In such cases a common practice is for the Commission to act without hearing, based upon field investigation or upon the showing of the application itself, and this may even be done when formal protest has been made.

On questions of interventions in pending proceedings the Commission has not, to my knowledge, ever denied such right, but it has usually allowed such interventions upon condition that the issues be not broadened thereby.

I may observe generally that in all matters coming before it no matter under which provisions of the Act, where the issues have been of any conceivable importance or the rights of interested parties have been substantially involved, this Commission has been at pains to accord every opportunity to the parties to present their contentions fully by way of hearing, briefs and argument.

As above indicated the Commission performs many functions with respect to which public interest requires promptness of action. To give effect to the decision in question to the extent its language seems to warrant might not only serve

to defeat the purpose of the Act itself but obviously would place a severe burden upon this agency from the standpoint of time, personnel and expense.

Sincerely yours,

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel.

DEPARTMENT OF LABOR,
OFFICE OF THE SOLICITOR,
Washington 25, March 1, 1949.

The Honorable PHILIP B. PERLMAN,
The Solicitor General,
Department of Justice,
Washington 25, D. C.

MY DEAR MR. SOLICITOR GENERAL. This is in reference to your letter of February 3, 1949 in which you presented certain questions as to the effect of the decision of the Court of Appeals for the District of Columbia in the case of *WJR* v. *Federal Communications Commission* on administrative legal functions of this Department. You pointed out in your letter that the decision holds that due process of law requires that oral argument be held on questions of law, irrespective of how meritless an application might be on its face, before an agency disposes of pending proceedings on the basis of the resolution of such issues of law, and you asked that I advise you as to the practices of this Department in similar situations.

After an analysis of the various administrative legal functions of the Department of Labor, under the statutes administered in the Department, it appears very unlikely that any question such as that presented in the *WJR* case might arise in connection with these functions. The regulations

and rules of practice which govern the administrative functions of the Department provide for adequate opportunity for oral hearing in all situations where an adjudication of property rights is involved.

Very truly yours,

William S. Tyson,
WILLIAM S. TYSON,
Solicitor of Labor.

NATIONAL LABOR RELATIONS BOARD,
Washington 25, D. C., March 3, 1949.

Honorable PHILIP B. PERLMAN,
Solicitor General, Department of Justice,
Washington, D. C.

Re: *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, Supreme Court No. 495, October Term, 1948

DEAR MR. PEARLMAN: We have your letter of February 3, 1949, inquiring as to the Board's practice respecting oral arguments and the effect which the rule applied by the Court of Appeals for the District of Columbia in the above case would have on the Board's work were that decision to be affirmed by the Supreme Court.

The number of cases which come before the Board is so great that it would be physically impossible for the Board to comply with the rule enunciated by the Court of Appeals for the District of Columbia. During the fiscal year July 1947 to June 1948, the Board received 36,735 new cases (Thirteenth Annual Report of the National Labor Relations Board, Gov't Print. Off., 1949, p. 96). The Board has always followed the practice of granting oral argument in only a limited number of cases. It has never believed that it was required by either the Constitution or

applicable statutes to hear oral argument in all cases which presented a substantial issue of law or fact.

The Board's Rules and Regulations, Series 5, as amended August 18, 1948 (12 Fed. Reg. 5656, 13 Fed. Reg. 4872, 14 Fed. Reg. 78) provide that in unfair labor practice cases arising under Section 8 of the National Labor Relations Act, as amended, after the issuance of an intermediate report following a hearing before a trial examiner, if the parties have filed exceptions thereto they may request oral argument within 10 days after the date of service of the order transferring the case to the Board (Rules and Regulations, Section 102.46 (c)). In the accompanying Statement of Procedure (Section 101.11 (c)) the Board stated that in such cases "Oral argument is very frequently granted." However, the decision as to whether or not to grant oral argument is not necessarily made to turn upon the existence of a substantial question of law or fact. In the cases involving novel, difficult or important issues the Board usually grants oral argument. It does not ordinarily grant oral argument on any of the interlocutory phases of the case, as for instance, appeals taken during the course of a hearing from rulings on supoena applications, on motions to disqualify a trial examiner, or on motions to dismiss allegations of the complaint. In most instances, opportunity for oral argument at the hearing is afforded the parties by the Trial Examiner.

In representation cases arising under Section 9 (c) of the Act the Rules (Section 102.60) specify that the Board may proceed to decide the case "upon the record, or after oral argument or the submission of briefs," but in its Statement of Procedure, the Board states (Section 101.20 (c)):

> Because of the nature of the proceedings, however, permission to argue orally is rarely granted.

The Board similarly characterizes the frequency with which it hears oral argument in cases involving referendums on union security under Section 9 (e) (1) and (2) of the Act (Statement of Procedures, Section 101.25 (c)).

The Statement of Procedures provides that in jurisdictional dispute cases under Section 10 (k) of the Act (Statement of Procedures, Section 101.33):

> The parties have 7 days after the close of the hearing to file briefs with the Board and to request oral argument which the Board may or may not grant.

Your more specific question as to whether this agency dismisses "petitions or applications insufficient on their face as a matter of law without allowing oral argument" is, we believe, answered by the preceding paragraphs as far as action by the Board itself is concerned.

In the regional offices, the Regional Director may refuse to accept a petition for certification which is insufficient on its face as a matter of law without, of course, oral argument or briefs. Section 102.63 of the Board's Rules and Regulations permits an appeal to the Board from the Regional Director's action in such cases. While the Board does not hear oral argument on such appeals, the appellant is not precluded from filing a brief.

The Regional Director may also refuse to issue a complaint when he deems the initiating charge to be insufficient as a matter of law. On appeal to the General Counsel from such action (pursuant to Section 102.19 of the Board's Rules and Regulations), no oral argument is had, although briefs may be filed. As the General Counsel's authority in such matters is final, under Section 3 (d) of the Labor Management Relations Act,

1947, Board review of his action is not available.

We hope the foregoing information will be helpful to you in the preparation of the brief in the above entitled case. If there is any further information which you desire, do not hesitate to call on us.

Sincerely yours,

Robert N. Denham,
ROBERT N. DENHAM,
General Counsel.

Ida Klaus,
IDA KLAUS,
Solicitor.

UNITED STATES MARITIME COMMISSION,
Washington 25, D. C., February 14, 1949.

Honorable PHILIP B. PERLMAN,
Solicitor General Department of Justice.

DEAR MR. PERLMAN. Reference is made to your letter of February 3, 1949 (D. J. File No. 82–38), referring to the decision of the Court of Appeals for the District of Columbia in *WJR, the Goodwill Station, Inc.* v. *Federal Communications Commission,* requesting advice as to Maritime Commission practice and the potential effect of the decision of the Court of Appeals upon the Maritime Commission.

The Maritime Commission's Rules of Procedure published in the Federal Register September 12, 1946 (Rule 201.130 reads as follows):

> SEC. 201.130. *Oral argument at hearings.*—A request for oral argument at the close of testimony will be granted or denied by the presiding officer in his discretion.

Section 201.211 of the Rules reads as follows:

> SEC. 201.211. *Oral argument.*—If oral argument before the Commission is desired on exceptions to an initial, recommended,

or tentative decision, or on a motion, petition, or application, a request therefor must be made in writing. Any party may make such request irrespective of his filing a brief or memorandum under section 201.197. If a brief or memorandum is filed excepting to or in support of an initial, recommended, or tentative decision, the request for oral argument must be incorporated in such brief or memorandum. Requests for oral argument on any motion, petition, or application must be made in the motion, petition, or application, or in the reply thereto. Applications for oral argument will be granted or denied in the discretion of the Commission, and if granted, the notice of oral argument will set forth the order of presentation. Upon request, the Commission will notify any party of the amount of time which will be allowed him. Those who appear before the Commission for oral argument should confine their argument to points of controlling importance. When the facts of a case are adequately and accurately dealt with in the initial, recommended, or tentative decision, parties should, as far as possible, address themselves in argument to the conclusions. Effort should be made by parties taking the same position to agree in advance of the argument upon those who are to present their side of the case, and the names of such persons and the amount of time requested should be received by the Commission not later than ten (10) days before the date set for the argument. The fewer the number of persons making the argument the more effectively can the parties' interests be presented in the time allotted.

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The quoted sections of our Rules are conclusive that the Maritime Commission has never considered the *privilege* of arguing *orally* as a constitutional *right*. It is quite clear that compliance with the decision of the Court of Appeals in the case under discussion would require amendment of the Maritime Commission's Rules of Procedure, or at least an application in practice which would constitute negation of their meeting.

Section 201.191 of the Commission's Rules reads as follows:

> Sec. 201.191. *Briefs; requests for findings.*—The presiding officer shall fix the time for filing briefs and the period of time allowed, subject to the provisions of section 201.4, shall be the same for all parties unless the presiding officer, for good cause shown, directs otherwise. Parties may not file more than one brief except in unusual cases. In investigations instituted on the Commission's own motion the presiding officer may require the attorney for the Commission to file a request for findings of fact and conclusions prior to the filing of briefs, and in such cases briefs shall be filed within twenty (20) days after the date of service of such request. Service of the request shall be in accordance with the provisions of section 201.94. In addition to the ordinary summary of evidence and statements of law, with appropriate citations of the transcript, and authorities relied upon, the brief shall contain proposed findings of fact and conclusions in serially numbered paragraphs.

We are aware of no precedent in the Maritime Commission relative to a precisely similar situation to that which was presented in the WJR case. Our practice under the quoted rules would allow the filing of briefs in support of a motion

to intervene, but would clearly permit the Commission to deny oral argument of such a motion. In our opinion, a requirement that oral argument be permitted in support of all petitions, applications, and motions which may be filed before the Maritime Commission would be extremely burdensome, time consuming, and would, in fact, hamper the efficient disposition of the Commission's business.

Such a requirement would appear, potentially, extremely dangerous to the efficient performance of the Commission's non-regulatory business, such as the routine settlement of accounts and disposition of claims. It would be infinitely troublesome as applied to the subsidy functions of the Maritime Commission pursuant to the Merchant Marine Act, 1936. The majority opinion of the Court of Appeals, of course, is not fully clear to us, and we do not assume that it will be construed to cover our subsidizing and proprietary functions. We, nevertheless, consider the possibility that it might be so construed as an additional reason for seeking reversal of what we regard as an essentially unsound decision.

Very truly yours,

Paul D. Page, Jr.,
PAUL D. PAGE, Jr.,
Solicitor.

FEDERAL POWER COMMISSION,
Washington 25, Mar. 11, 1949.

The Honorable PHILIP B. PERLMAN,
Solicitor General, Department of Justice,
Washington, D. C.

DEAR MR. PERLMAN. We have given considerable study to your letter of February 3, 1949, concerning the decision of the Court of Appeals for the District of Columbia Circuit in the case of ***WJR, the Goodwill Station, Inc.*** v. ***Federal***

Communications Commission. The decision may have considerable effect upon our procedures, particularly in our Natural Gas Division where the volume of quasi-judicial matters is quite heavy.

It has been our practice to grant or deny without oral argument petitions for declaratory orders, petitions to intervene, and motions to dismiss. In addition we have usually afforded no opportunity for argument before denial of protests against the allowing of new rate schedules to become effective. In all cases, however, the Natural Gas Act affords the Commission an opportunity to hear parties on application for rehearing, which application is a prerequisite to judicial review. A logical extension of the doctrine of the *WJR* case might require the according of an opportunity for oral argument in all of the foregoing types of proceedings.

Petitions or applications for certificates of public convenience and necessity and to require new service by natural gas companies uniformly are disposed of after full hearing. The Commission on occasion has refused to accept such petitions or applications for filing on the ground that they did not conform to the Commission's rules and regulations but once properly filed such petitions or applications are heard. In all hearings the filing of briefs is permitted by specific rule. Our rules also permit requests for oral argument to be made and such requests are granted almost without exception.

However, the Commission has in a few instances dismissed incomplete applications for licenses for construction of hydroelectric power projects under Part I of the Federal Power Act. In no such case, so far as our search reveals, has such dismissal occurred without hearing where a hearing has been requested.

Requiring oral argument on the type of matters enumerated in the second paragraph of this letter

would impose a substantial burden upon the Commission and, I feel, would seriously impede it in the performance of its duties because of the great incident delay.

Sincerely,

Bradford Ross,
BRADFORD ROSS,
General Counsel.

POST OFFICE DEPARTMENT,
OFFICE OF THE SOLICITOR,
Washington 25, D. C., February 7, 1949.

Honorable PHILIP B. PERLMAN,
Solicitor General, Department of Justice,
Washington, D. C.

Re: *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission*

DEAR MR. PERLMAN: I have your letter dated February 3, 1949, concerning the decision of the United States Court of Appeals for the District of Columbia in the above-entitled case.

It is noted that the Court has ruled that due process of law, as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer except questions raised on interlocutory orders.

In response to your request for a statement of the practice of this Department in similar situations, the following information is furnished.

In ordinary fraud order proceedings, Rule 51.22 of the enclosed Rules of Practice In Cases Arising Under The Postal Fraud, Lottery And Fictitious Statutes, provides that "the trial examiner shall permit oral argument on behalf of the parties to the proceeding at the conclusion

of the hearing." However, under Rule 51.23, the trial examiner may exercise his discretion as to whether the filing of briefs in any case shall be permitted.

On petitions to reopen proceedings, Rule 51.24, no oral argument upon such petition is provided for by the rules. It has been the practice of the Department to grant or deny a request for such oral argument dependent upon the nature of the case and attendant circumstances such as the importance of the time element and, of course, the apparent validity of the grounds alleged in the petition and in the request for oral argument. Delays incident to arranging or rearranging the hearing dockets to provide a time and date for such oral argument might in certain types of cases so delay administrative action as to occasion great injury to the public. Of course, such delays must be avoided or minimized in order that the Postmaster General may properly perform his duty under the postal laws.

You will also note that Rule 51.28 makes no provision for oral argument in support of petitions for the revocation or modification of fraud orders. These petitions may and frequently do involve questions of law, which may be briefed by the petitioner. Even though questions of law are involved in such petitions and are not briefed, the petition may be disposed of without oral argument, although such argument might be granted in exceptional circumstances. Similar considerations apply to the granting and denial of hearings upon such petitions.

This office has numerous cases involving the disputed ownership of mail. Claimants are required to submit their statements in writing but no provision is made either for hearings or oral arguments where legal questions are involved. To do so would involve delay and expense to the parties and to the Department. Upon the basis of exten-

sive past experience, it does not appear that any useful or necessary purpose would be served by such provision.

No provision is made for hearings or oral arguments by parties seeking modification of rulings under the postal monopoly laws or so-called private express statutes.

For your information upon the subject of "due process" involving the exclusion or seizure of obscene matter deposited in the mails, there are herewith enclosed two copies of Litigation Manual Memorandum No. 5, discussing the case of *Jacobs, et al.*, v. *Kruetgen* and *Walker* v. *Poponoe*, 149 F. 2, 511, U. S. C. A., District of Columbia. You will note that the Poponoe decision is in harmony with the Federal Communications v. WJR decision.

This Department is daily engaged in making numerous decisions involving property rights not only in merchandise but in mailing rights. It also receives numerous requests in the nature of petitions to reverse decisions and to reinterpret the provisions of the postal laws in such manner as to favor the petitioners' use of the mails.

The Department establishes and disestablishes post offices every day without hearings and in the case of delivery services extends or curtails them as the needs and available facilities of the service require, always without hearings.

The Department rejects original applications for the entry of publications as second class matter or the admission of certain others to the special low classes of postage without formal hearings, which in the case of second class mail are only required in case of suspension or revocation of the mailing permit. Of course, petitions for reconsideration are disposed of without hearings or oral argument even though questions of law are raised incidentally thereto.

To subject all of these and many more numerous and daily proceedings to the require-

ments implicit in the Court of Appeals decision would hamper enormously the performance of its duties and the rendition of public service by the Post Office Department. Thus, the universal and literal application of the principles in the Court's decision would impose a substantial burden upon the postal establishment and impede the rendering of adequate, prompt mail service at a reasonable cost. In the final analysis such a burdensome requirement would be inimical to the general public interest without measurably or necessarily increasing the protection guaranteed by the Constitution and the laws of the United States to the users of the mails.

Very truly yours,

Roy C. Frank,
ROY C. FRANK,
Acting Solicitor.

UNITED STATES OF AMERICA,
RAILROAD RETIREMENT BOARD,
844 Rush Street, Chicago 11, Ill., Feb. 25, 1949.

The Honorable PHILIP B. PERLMAN,
Solicitor General,
Washington 25, D. C.

Re: File D. J. 82–38

DEAR MR. PERLMAN: I have your letter of February 3, 1949, requesting a statement, in connection with the preparation of the Government's brief in the case of *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission,* whether and under what circumstances this agency would grant oral argument on questions of law and what would be the effect on our agency of the decision of the Court of Appeals for the District of Columbia, in the above-mentioned case, that oral argument must be granted on any question of law arising before any judicial or quasi judicial agency.

Our agency administers the Railroad Retirement Act and the Railroad Unemployment Insurance Act. The Railroad Retirement Act provides old-age and disability annuities for railroad employees and lump sum or monthly annuity benefits for their survivors; the Railroad Unemployment Insurance Act provides benefits for unemployment due to lack of work or sickness or other disability and requires the Board to collect from employers covered by the Act the taxes or contributions necessary to finance the unemployment system. Both Acts authorize the Board to make investigations, to compel attendance of witnesses, to take testimony and make investigations in connection with the administration of these Acts, but neither requires expressly that oral argument be granted on any question presented to the Board. The closest that the Railroad Unemployment Insurance Act comes to such a requirement are the provisions that "at the request of any party interested" in a case involving coverage of the Act "the Board shall provide for a hearing" and in connection with a claim for benefits the Board must furnish, where benefits have been denied, either, depending on the issue involved, "an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto" or "a hearing" "at the request of any party properly interested." Section 5 (c). The Railroad Retirement Act is not as explicit on the right to a "hearing" as is the Unemployment Insurance Act, it providing only, as to this, that, in the event the Board has delegated authority to make a decision to a subordinate, the claimant "aggrieved by the decision so made shall have the right to appeal to the Board." Section 10 (b) 5.

In the initial adjudication of claims for benefits or determinations of coverage under either Act, the Board does not provide any opportunity for oral argument on any question. On appeals from

an initial determination to the intermediate appellate body which the Board has set up in connection with adjudications of benefit claims under the Railroad Retirement Act the Board's regulations provide, however, "full opportunity" "to present argument in support of the appeal," subject to the requirement that this intermediate agency "protect the record against scandal, impertinence and irrelevancies" (20 C. F. R., 1947 Supp., 260.2 (e)). In practice, this appellate unit has been very liberal in allowing oral and written argument on any question which is claimed to be involved in an appeal, but in a recent case an application by an attorney to be heard orally, because of the fear of an adverse precedent in cases other than those in which he was directly authorized to act, was summarily dismissed, as was also an application to argue orally, without regard to an actual case, the question of the constitutionality of a provision of the Railroad Retirement Act. On appeals to the Board itself, however, oral argument is not provided for all cases. While the Board has on occasion permitted such oral argument, it does not do so as a matter of right. The regulation on this point reads as follows:

> The decision of the Board shall be made upon the record of evidence and argument which has been made in the handling of the case before final appeal to the Board, with such additions as may be made pursuant to this section. Further argument will not be permitted except upon a showing by the appellant that he has arguments to present which for valid reasons he was unable to present at an earlier stage, and in cases in which the Board requests further elaboration of the appellant's arguments. In such cases, the further argument shall be submitted orally or in writing, as the Board

may indicate in each case, and shall be subject to such restrictions as to form, subject matter, length and time as the Board may indicate to the appellant. (20 C. F. R., 1947 Supp., 260.3 (e).)

The regulations and the practice on appeals under the Railroad Unemployment Insurance Act are substantially the same as for the Railroad Retirement Act except that while there is a definite right of appeal to the Board in every case under the Railroad Retirement Act, the appeal to the Board under the Railroad Unemployment Insurance Act is a matter of discretion. Thus, under the Railroad Unemployment Insurance Act, the Board's regulations provide:

> *Procedure upon filing application for permission to appeal to Board.*—The Board may grant or deny an application for permission to appeal to the Board, filed under § 320.38. Notice of the Board's decision with respect to an application for permission to appeal to the Board shall be communicated to the properly interested parties within fifteen days from the date such decision is made. If the application for permission to appeal to the Board has been denied, the notice communicated to the parties shall include notice that the decision of the referee is final decision of the Board. If permission to appeal to the Board is granted, the parties shall not have the right to submit additional evidence, except that (a) the Board may permit the submission of additional evidence upon a showing by any properly interested party that he has additional evidence to present which, for valid reasons, he was unable to present at an earlier stage; (b) the Board may request the submission of additional evidence; and (c) the Board

> may designate any employee of the Board to take additional evidence, and to report his findings to the Board. Any such additional evidence shall be submitted in such manner as the Board may indicate and shall be included in the record. (20 C. F. R., 1947 Supp., 320.40.)

Further, the regulations provide:

> *Decision of Board.*—The decision of the Board on an appeal to the Board shall be made upon the basis of the record established in accordance with § 320.28 [that is, at the hearing before the intermediate appellate body] * * * (20 C. F. R., 1947 Supp., 320.42).

To grant oral argument at all stages in the Board's adjudication of claims for benefits or questions of coverage, and in respect of all questions of law which might arise, would impose an unbearable and wasteful burden on the Board in view of the many hundreds of thousands and even millions of such claims or questions adjudicated by the Board each year and in view of the small amounts involved. In the last fiscal year, for instance, the Board or its staff had to consider 1,346,574 claims for unemployment benefits due to lack of work, and 799,903 claims for benefits due to sickness, which were received in the year, and of the total pending, 1,852,440 were acted on favorably, the average unemployment benefit awarded being less than $30, and the average sickness benefit about $40. In addition, a total of 45,616 retirement annuity applications under the Railroad Retirement Act were ruled upon during the year, together with 69,111 applications for monthly or lump sum survivor benefits, all these, of course, generally involving sums much larger than the average unemployment or sickness benefit. (*The Monthly Review* (Railroad

Retirement Board) August 1948.) So that it is quite clear that no useful purpose, commensurate with the matters involved, would be served by requiring the Board to grant oral argument in every case and in every circumstance, and that so to do would intolerably hamper the Board's administration.

Sincerely yours,

Myles F. Gibbons,
MYLES F. GIBBONS,
General Counsel.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington 25, D. C., March 1, 1949.

HON. PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

Re: *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission*

DEAR MR. PERLMAN. This is in reply to your letter of February 3, 1949, inquiring as to the potential effect of the decision of the Court of Appeals in the above case upon this Commission's practice, with specific reference to the granting of oral argument, and permission to file briefs, in support of applications which appear insufficient on their face.

Although I believe that the situation involved in the WJR case is distinguishable from situations which might arise before this Commission, to the extent that the opinion of the court in that case tends to deprive administrative agencies of discretion in determining what procedures are appropriate to arrive at a fair determination, the decision might well have a serious adverse effect on

this Commission's policy of attempting to provide procedures best suited to particular proceedings. In view of the various sorts of administrative proceedings arising under the statutes administered by the Commission, in some of which time is necessarily of the essence if the public interests or the interest of regulated persons are not to be adversely affected, the Commission has consistently opposed rigid procedural requirements which, however suited to one type of proceeding might be unnecessary and possibly unfair in another context. See Comments of the Securities and Exchange Commission on S. 7 (1945), copies of which were sent to the Senate and House Committees on the Judiciary at the time bills looking to an Administrative Procedure Act were under consideration. As pointed out therein (p. 4):

> * * * if the standards for review of administrative action should come to depend upon technical interpretations of formal requirements, instead of upon considerations of fairness and practicability the agencies and those having business with them would frequently be driven to follow procedures which would be wasteful of both time and manpower and which would serve neither the public nor the private interests affected. Both the agencies and the parties before them would be compelled to do so for the sole purpose of avoiding possible grounds for captious attack upon orders or rules. Such procedural provisions would furnish a weapon for obstruction and delay not only to persons who may be striving to circumvent the statutes, but also to obstructionists seeking to prevent agency authorization of legitimate transactions sought by other parties.

While the present decision appears to turn upon conceptions of due process and not upon any specific legislative requirement, it may be noted that Congress in adopting the Administrative Procedure Act in its final form rejected the theory of the earlier bills that administrative due process could be rigidly defined.

In answer to your question regarding the filing of briefs, the Commission considers them on any application, and indeed they are normally required to be filed. See the Commission's Rules of Practice VI (b) and XI (c).

With respect to oral argument, in general the Commission has made it a practice to be very liberal in granting requests therefor. Since the granting of requests for oral argument, even with respect to contentions which have appeared on their face to be lacking in substance, has been done as a matter of policy and requests of this character have not thus far been numerous, the Commission has not found it burdensome to pursue a practice which may go as far as the requirement of the Court of Appeals in the WJR case. If, however, the decision of the Court of Appeals stands as making the granting of a request for oral argument a matter of right, no matter how frivolous the contention, we believe there is danger that this might encourage frivolous and dilatory requests to the point which would seriously interfere with the timely disposition of proceedings. Moreover, as the dissenting opinion notes, the question of whether opportunity for oral argument is a matter of due process is interrelated with the question of how long a period for argument constitutes due process. If the agency cannot decide as a matter of judgment to deny oral argument which does not seem likely to aid the decisional process, it is difficult to see at what point it may limit oral argument or direct counsel

to confine their argument to what appear to be relevant issues. If possible disagreement by a reviewing court on rulings of this character is to be ground for reversal regardless of the correctness of the Commission's ruling on the point of law involved, it will be compelled as a matter of precaution to give more time to oral argument than it believes warranted. This will necessarily leave it less free to devote itself to matters which it regards as more important to protect both private and public interests.

The Commission's formal rules with respect to oral argument are contained in its Rules of Practice: Rule VI, Motions and Procedural Applications; Rule XII, Hearings Before the Commission; and Rule XVII, Intervention, Leave to be Heard, Informal Participation.

Rule VI (b) provides that "motions or procedural applications calling for determination by the Commission" shall be made in writing and "shall be accompanied by a written brief of the points and authorities relied upon in support of the same." The rule then provides:

> No oral argument will be heard on such matters unless the Commission so directs.

Applications of this sort appear to fall in part at least within the exception noted by Chief Judge Stephens with respect to "such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite,* for temporary injunctions and the like." In any event, as a practical matter, even on procedural applications pursuant to Rule VI (b) the Commission often grants requests for oral argument.

Rule XII (a) of the Commission's Rules of Practice provides:

> Except as to motions and procedural applications dealt with in Rule VI, upon written request of any party the matter

> to be decided by the Commission will be set down for oral argument before the Commission unless exceptional circumstances make oral argument impractical or inadvisable.

So far as I have been able to ascertain, the Commission has never denied a request by a party for oral argument pursuant to this rule.

The dissenting opinion in the WJR case describes WJR's application to the Federal Communications Commission as basically a petition to intervene. Whether or not it would be more burdensome, in the context of the Federal Communications Act, to accord oral argument upon insubstantial petitions for intervention than upon other applications insufficient on their face, I believe there is a relevant distinction under the Public Utility Holding Company Act between primary applicant for relief and the status of persons appearing in opposition thereto. Under that Act virtually all important financial transactions by registered holding companies and their subsidiaries must be subject to authorization of this Commission in the light of broad standards relating to the public interest or the "interest of investors" and objecting security holders frequently request opportunity to be heard, or to intervene, in connection with applications for such authorization. In view of the time element in many financial transactions, delayed authorization may be tantamount to denial. Consequently, while expressions of views of objecting investors may be helpful, full participation by these investors could prove unreasonably obstructive. Section 19 of the Public Utility Holding Company Act provides that the Commission "shall" admit as a party any interested agency, such as a state authority, and "may admit as a party any representative of interested consumers or security

7

holders, or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers."[1]

[1] This problem was also brought to the attention of the Congress when it had under consideration early drafts of the bill which became the Administrative Procedure Act of 1945. In the May 1945 Committee Print of S. 7, "party" was defined by Section 2 (b) of the bill as including "any person or agency participating, or properly seeking and entitled to participate, in any agency proceeding or in proceedings for judicial review of any agency action."

This Commission pointed out to the interested Congressional Committees that the definition so phrased "by including without qualification persons participating in agency or review proceedings, fails to recognize the desirability in many proceedings of granting limited participation to certain persons without conferring all the rights that attach to one having the status of a 'party,' and fails to differentiate clearly between parties to agency proceedings and parties to judicial review proceedings." The Commission pointed out, *inter alia*, that "the existence of a great number of parties would result in delay; which, because of ever changing market conditions, might make impossible the effectuation of the proposal for which Commission approval was sought," and also pointed out that:

"It would seem unnecessary for purposes of the bill to define 'party' with reference to proceedings for judicial review, and inasmuch as persons not parties to an agency proceeding may nevertheless have standing for purposes of judicial review, it seems to us confusing to define in the same sentence the word 'party' for both purposes."

The Commission then recommended that the second sentence of Section 2 (b) be amended to read:

"'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding."

which language was used in the Act as enacted. See Appendix to Comments of the Securities and Exchange Commission, dated July 25, 1945, on Specific Provisions of S. 7,

Rule XVII of the Commission's Rules of Practice relating to intervention, leave to be heard, and informal participation, evidences a policy of the Commission generally to deny intervention as a full party to anyone except certain government agencies and similar bodies. Instead interested persons are, at the discretion of the hearing officer, given leave to be heard (Rule XVII (b)) which may include the right to call and examine witnesses and otherwise actively participate in the hearing (Rule XVII (c)), and the hearing officer is directed to grant leave to be heard in certain situations (Rule XVII (f)). Oral argument by persons granted limited participation may be granted, however, "only by the Commission upon written request therefor" (Rule XVII (c)). In practice, the requests for oral argument of persons who have been granted a limited right to be heard are normally granted to the same extent as those of full parties. The Commission has, however, had occasion to deny oral argument on a motion by a party to strike the appearance of several persons granted limited rights of participation. See *Philadelphia Company*, __ S. E. C. __, Holding Company Act Release No. 7381 (1947), where the Commission stated it was denying the request for oral argnment "since the issues raised were fully explored in the briefs and since it does not appear that

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Revised Text, Committee Print May —, 1945, pp. 1-3. The subsequent report of the Senate Committee on the Judiciary pointed out that by the definition of "party" in Section 2 (b) of the Act:

"The practice of agencies to admit persons as parties in proceedings 'for limited purposes' is expressly preserved, but that exception does not authorize any agency to ignore or prejudice the rights of the true or full parties in any proceeding." S. Rep. No. 752 (1945), 10-11.

oral argument would be of any additional aid in the dispositions of the motions."[2]

Assuming that in some instances a private person seeking to participate in the Commission proceeding might have such an interest, not otherwise adequately represented, that the denial of intervention or of limited participation by the Commission could be considered an abuse of discretion, it seems clear that the Commission must nonetheless have a very wide discretion to deny participation to persons who apart from the Act would have no legal interest to object to the granting of the relief sought by the primary party to the proceeding, even where under the Act he would be entitled to have a reviewing court consider his objections and set aside the Commission's authorization if erroneous. See *Okin* v. *Securities and Exchange Commission*, 325 U. S. 385.

While the Holding Company Act makes it mandatory to accord an opportunity for hearing upon plans of reorganization, Sections 7 (b) and 10 (d) indicate that in the regulation of current transactions it must accord an opportunity for hearing only where authorization for the proposed transaction is denied. Nevertheless, under Rule U-23 it is the practice of the Commission to publish notice of the filing of applications in order to afford interested persons an opportunity to request a hearing thereon. Such notices require interested persons desiring a hearing to file a request therefor by a prescribed date, setting forth their interest and the reasons for their request. Despite receipt of a request by an inter-

[2] Subsequently in the same case, where the hearing officer denied the limited participation sought because the person seeking participation refused to set forth certain matters deemed relevant to his interest in the case, oral argument on the propriety of the hearing officer's determination was heard by the Commission. *Philadelphia Company*, — S. E. C. —, Holding Company Act Release No. 7590 (1947).

ested person, the Commission has on occasion refused to hold a hearing where it appears from the statement filed that no useful purpose will be accomplished by the hearing, especially where the delay might "open an avenue for obstruction and delay to the prejudice of parties to the proceeding." See *Electric Bond and Share Company*, — S. E. C. —, Holding Company Act Release No. 7383 (1947) 4. In that case the Commission did hear oral argument on the question whether it should hold evidence-taking hearings on the application there involved but it has apparently not always done so, at least where no specific request for oral argument was made. See *American & Foreign Power Company, Inc.*, Holding Company Act Releases Nos. 5757 (1945) and 5989 (1945). Since the person seeking hearings in those proceedings would be a person aggrieved by the Commission's order, it might be argued that the action of the Commission in denying the request was improper under the court's decision in the WJR case. This would appear to be inconsistent, however, with the provisions of Section 19 of the Holding Company Act, referred to above, that the Commission should admit private individuals as parties to proceedings only if their participation "may be in the public interest or for the protection of investors or consumers."

The Commission has on occasion denied requests for hearing by persons who claim to be affected by the action of the Commission in cases where the applicable statute requires no hearing and the Commission believes the applicants are not persons who can be "aggrieved" by its action. Thus where a minority security holder requested a hearing before the Commission to determine in effect whether a registration statement filed by his corporation pursuant to Section 6 of the Securities Act of 1933 should be permitted to become effective, this request was denied by the Commission and no oral argument was permitted. See

Crooker v. *Securities and Exchange Commission*, 166 F. 2d 944 (C. A. 1, 1947). Similarly, the Commission has denied requests for a hearing on proxy solicitation material filed by another party pursuant to the Commission's Rule U-62 and Section 12 (e) of the Public Utility Holding Company Act. See *Phillips* v. *Securities and Exchange Commission*, 171 F. 2d 180 (C. A. 2, 1948). I do not think that the WJR decision would require the Commission to hold hearings in these situations because of the completely discretionary nature of the administrative determination and the absence of any statutory provision according any right of participation to the persons seeking a hearing.

I am enclosing for your convenience copies of all Commission documents referred to herein. Please do not hesitate to call upon me if I can be of any further assistance.

Very truly yours,

Roger S. Foster,
ROGER S. FOSTER,
General Counsel.

Enclosures:
Rules of Practice.
Comments on S. 7.
H. C. A. Release No. 7590.
H. C. A. Release No. 7381.
H. C. A. Release No. 7383.
H. C. A. Release No. 5757.
H. C. A. Release No. 5989.

FEDERAL SECURITY AGENCY,
Washington, Zone 25, February 17, 1949.

Hon. PHILIP B. PERLMAN,
Solicitor General, Department of Justice,
Washington 25, D. C.

DEAR MR. PERLMAN: Reference is made to your letter of February 3, 1949 in which you

inquire as to the effect of the decision of the Court of Appeals for the District of Columbia in *W.J.R, the Goodwill Station, Inc.* v. *Federal Communications Commission* on this Agency.

The only administrative unit of the Federal Security Agency which may be affected by that decision is the Food and Drug Administration. None of the other administrative units render ex parte decisions under any circumstances.

The principal adjudicatory proceeding with which the Food and Drug Administration is concerned arises in connection with its refusal to permit an application with respect to a new drug to become effective [21 U. S. C. 355 (d)]. In such cases it has been the practice not to permit oral argument on questions of law; but there is no regulation in effect governing that practice.

The rules of practice of the Food and Drug Administration provide that in rule-making proceedings no oral argument shall be permitted unless authorized by the presiding officer [21 CFR. Cum. Supp. 2.709] but written arguments are received routinely.

Specifically, the Food and Drug Administration will dismiss, without oral argument, a petition or application to amend a standard of identity for a food where the petitioner's application is insufficient on its face as a matter of law. No provision is made for the filing of briefs in support of the application or petition before its dismissal, although a brief would be considered if it had been submitted with the application.

Should the decision in the above case be extended to rule-making proceedings arising under the Federal Food, Drug, and Cosmetic Act, it would greatly burden this Agency and impede the performance of its duties. Rule-making proceedings looking to the establishment of standards for food products ordinarily cover the operations of large industries. We recently have completed hearings looking to the standardization of cheese

products, frozen fruits, and salad dressing. The cheese record exceeds 5,000 pages. The other records are comparable in length. Many interests were concerned. If the statutory obligation of hearing requires a right to oral argument upon law questions, these proceedings may well be endless. Certainly, a very substantial portion of the Agency's time would be devoted to oral arguments on questions of law.

Sincerely yours,

Robert C. Ayers,
ROBERT C. AYERS,
Associate General Counsel.

FEDERAL TRADE COMMISSION,
Washington 25, February 14, 1949.

D. J. File No. 82-38

HON. PHILIP B. PERLMAN,
Solicitor General, Department of Justice,
Washington, D. C.

DEAR MR. PERLMAN: I am in receipt of your letter of February 3, 1949, regarding the decision of the Court of Appeals for the District of Columbia in the case of *WJR, The Goodwill Station, Inc.*, v. *Federal Communications Commission*, requesting information as to the practice of the Federal Trade Commission in similar situations and of the potential effect of the decision upon this Agency.

The Rules of Practice of the Federal Trade Commission provide for oral argument as follows (Rule XXIV (c), 12 Fed. Reg. 5997, 6001, Sept. 10, 1947):

> Oral arguments before the Commission shall be had as ordered, on written application of the Chief Trial Counsel of the Commission, or of the respondent, or of attorney for respondent, filed within fifteen

(15) days after filing of brief on behalf of respondent.

Oral arguments before the Commission shall be reported stenographically unless otherwise ordered by the Commission.

The first section of the same rule (Rule XXIV (a)) sets forth the questions which may be presented to the Commission, by brief or argument, as follows:

Questions which may be presented for consideration and decision by the Commission on final hearing include the following:

(1) Whether the findings and conclusions recommended by the trial examiner are relevant and material to the issues and are supported by reliable, probative, and substantial evidence and by the greater weight of the evidence;

(2) Whether additional findings and conclusions, not recommended by the trial examiner, should be made either with or without sending the case back to the trial examiner for the reception of further evidence;

(3) Whether the trial examiner was justified in having taken official notice of any fact and whether the Commission should take official notice of any other fact;

(4) Whether due process was observed and whether there was any prejudicial irregularity in procedure;

(5) Whether the facts show a violation of law amenable to redress by the Commission and what conclusions of law are justified and requisite in the premises; and

(6) Whether an order to cease and desist, an order of dismissal, or other order, should be entered and issued, and the substance and form thereof.

While the rule relating to argument does not require the Commission to grant argument on any matter, it has been the invariable practice of the Commission to grant argument at the final hearing on the merits unless argument is waived.

If the Commission were required to grant argument on any point of law raised to it by petition or application, however frivolous or ill-founded, the effect might well be to interfere in a substantial manner with the orderly conduct of its business.

One instance where this rule might prove unfortunate is the matter of a petition to intervene in a pending proceeding. Both the Clayton and Federal Trade Commission Acts provide that any person may make application for leave to intervene and appear in any proceeding upon good cause shown. While the Commission has often granted argument on the question of the right of a person to intervene in a proceeding, it has never considered that argument was required as a matter of right. To require argument on application for intervention which did not show on its face a substantial interest or such other facts as would constitute "good cause" for intervention might serve to delay unduly the Commission's conduct of cases.

Another similar situation might arise in the case of a motion to dismiss a complaint issued by the Commission and while hearings are in process before a trial examiner. Should such a motion fail to state any substantial ground for dismissal, the Commission has considered itself justified in acting on briefs and without argument, and any other rule would make it conceivable for a party to require the Commission to sit in continuous session hearing argument on successive motions to dismiss, even though the right of full argument on the merits at the final hearing is provided by our rules of practice. Here again, the Commission

has granted argument as a matter of practice when there appeared to be presented a substantial question which warranted argument.

In neither of these situations has there been heretofore any substantial problem of procedure, and I cannot say that there is any reasonable likelihood that one will develop in the Federal Trade Commission. Nevertheless, if the holding of the Court in the *WJR* case is sustained, and the Commission is required to grant argument to any person who asserts a question of law, whether or not his petition or application is clearly frivolous, dilatory or otherwise insufficient, there is created a serious possibility that the disposition of cases before the Commission may be unduly hampered and delayed.

Respectfully yours,

W. T. Kelley,
W. T. Kelley,
General Counsel.

DEPARTMENT OF COMMERCE,
OFFICE OF THE SOLICITOR,
Washington 25, April 4, 1949.

The Honorable
The SOLICITOR GENERAL,
Department of Justice,
Washington 25, D. C.

Re: *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission.*

DEAR MR. SOLICITOR GENERAL: Pursuant to your request I am submitting herewith the comments of the Civil Aeronautics Administration, Patent Office, Office of Domestic Commerce, and Office of International Trade in regard to the above-captioned case, together with a copy of their regulations which may be affected thereby.

The foregoing are the only constituent units of the Department which may be affected by the subject cases.

Sincerely yours,

Matthew Hale,
MATTHEW HALE,
Acting Solicitor,

Enclosures:

To: Acting Solicitor, Department of Commerce.
From: General Counsel, A–18 [Civil Aeronautics Administration].

Subject: *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission.*

Reference is made to your memorandum, dated February 10, 1949, requesting information regarding the effect on this agency of the decision in the case of *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission.*

The powers and duties of the Administrator of Civil Aeronautics are defined in the Civil Aeronautics Act of 1938 and the Federal Airport Act.

The Civil Aeronautics Act, as modified by the President's Reorganization Plans III (April 2, 1940) and IV (April 11, 1940), sets up a form, the Civil Aeronautics Board, divorced from the Civil Aeronautics Administration, and which exercises its authority completely independent of the Department of Commerce. The quasi-judicial functions under the Act are relegated to that Board. An independent study of the possible effects of the WJR decision on the operations of the CAB is being prepared and will be submitted by its staff.[1]

The functions of the Civil Aeronautics Administration are almost exclusively executive. The Administrator may, however, conduct hearings on applications for a "type certificate" (a certificate that some prototype of aircraft or aircraft appliance meets minimum safety requirements), under Section 603 (a) of the Civil Aeronautics Act. This provision for hearings is permissive rather than mandatory, and is, therefore, exempted from the rule set forth in the WJR case.

Although the Civil Aeronautics Board is given exclusive authority to suspend or revoke any certificate issued under the Civil Aeronautics Act (Section 609, Sec. 7, Reorganization Plan III), and to hear petitions for reconsideration of denials of airman certificates (40 Op. A. G. 11), the Administrator has power to alter, amend, or modify certain certificates.

Section 609 of the Act requires that such action be taken only "upon notice and hearing." Such a hearing has not yet been necessary. All alterations, amendments and modifications which have been pressed by the Administrator have been voluntarily

[1] A reply from the CAB had not been received by the Solicitor General when this brief went to press.

accepted by the certificate holder. The Administrator, nevertheless, has promulgated regulations governing the conduct of such hearings should occasion for these proceedings arise. These regulations (Part 406, Regulations of the Administrator of Civil Aeronautics, Sections 406.5 through 406.8) provide for a hearing in every case in which one is requested. No conflict is anticipated with the rule in the WJR case.

It is assumed that the WJR case applies only where the statute governing the administrative activity provides for a hearing or where a hearing is necessary to satisfy the "due process of law" requirements of the Constitution. The Administrator may, without hearing, refuse to issue a variety of certificates (type certificates, production certificates, airworthiness certificates, air carrier operating certificates, air navigation facility certificates, and air agency certificates). Since no such action denies a vested property right and since the Civil Aeronautics Act does not provide that a hearing shall be conducted upon such denials, it is assumed that the rule of the WJR case does not apply.

Hearings are required to be conducted under the Federal Airport Act, which is administered by this agency. Section 9 (e) of that Act provides:

> Project applications shall be matters of public record in the office of the Administrator. Any public agency, person, association, firm, or corporation having a substantial interest in the disposition of any application by the Administrator may file with the Administrator a memorandum in support of or in opposition to such application; and any such agency, person, association, firm, or corporation shall be accorded, upon request, a public hearing with respect to the location of any airport the development of which is proposed. The Administrator is authorized to

prescribe regulations governing such public hearings and such regulations may prescribe a reasonable time within which requests for public hearings shall be made and such other reasonable requirements as may be necessary to avoid undue delay in disposing of project applications.

The "project applications" referred to are application by state or local public agencies for grants-in-aid for construction of airport facilities, under a National Airport Plan for coordinated expansion of airport facilities on a national scale.

Section 550.10 of the Regulations of the Administrator of Civil Aeronautics provides for the filing of memoranda in support of, or in opposition to project applications and, further, "If, in the opinion of the Administrator, the party filing the memorandum has a substantial interest in the matter, a public hearing will be held in accordance with paragraph (b) of this section." Obvously, if the WJR case doctrine controls, the quoted portion of that regulation, which authorizes the Administrator to determine whether the intervenor has a substantial interest, must fail. The problem, however, is largely academic. In the course of processing some seven hundred project applications since the enactment of the Federal Airport Act in 1946, only one memorandum in opposition has been received and, in that case, the objector was afforded a hearing.

However, if the decision stands for the proposition that the granting of any "hearing" by Congress automatically guarantees to the party a due process hearing, the decision will undoubtedly offer encouragement to parties to contest airport locations under the Federal Airport Act and will result in a greater amount of litigation under that Act.

R. E. Elwell,
R. E. Elwell, A–18.

[COPY]

DEPARTMENT OF COMMERCE,
UNITED STATES PATENT OFFICE,
Washington, February 15, 1949.

MEMORANDUM

To: Matthew Hale, Acting Solicitor, Department of Commerce.

From: W. W. Cochran, Solicitor, Patent Office.

Subject: WJR, *The Goodwill Station, Inc.* v. *Federal Communications Commission.*

The decision above referred to would apparently require the Patent Office to grant oral hearings in a large number of cases which have previously been disposed of without such hearings. These cases would include almost all petitions to the Commissioner in ex parte and inter partes patent and trademark cases, including petitions to revive abandoned applications and to accept late payment of final fees in allowed applications. The total number of such petitions during the past year was more than one thousand. It is also at least questionable whether the decision would not require oral hearings on petitions for rehearing by the Commissioner, the Board of Appeals, or the Board of Interference Examiners. The routine practice of the primary and interference examiners and the Board of Appeals would not be seriously affected, since it is the present practice of those tribunals to grant oral hearings when requested in the great majority of cases.

The principle stated in the decision would require the deletion of patent rule No. 181 (e) and trademark rule No. 27, which provide that oral hearings on petitions will be granted only in the discretion of the Commissioner.

It is probable that oral hearings would be requested only in a small percentage of cases but, even

so, a very considerable burden would be imposed upon the Commission or Assistant Commissioners, since the presence of one of them would be required at every hearing on a petition to the Commissioner. Moreover, the delay incident to oral hearings would greatly increase the time required for disposing of petitions and would encourage the bringing of petitions for purposes of delay.

(Signed) W. W. COCHRAN,
Solicitor, Patent Office.

MARCH 8, 1949.

MEMORANDUM

To: Mr. Matthew Hale, Acting Solicitor.

From: J. P. Brown, General Counsel, ODC [Office of Domestic Commerce].

Subject: Solicitors General's letter 2/3/49 re *WJR, Goodwill Station, Inc. v. F. C. C.*

I am in receipt of your memorandum of February 16 enclosing a letter to the Solicitor from the Solicitor General of the United States dated February 3, 1949, commenting upon the decision of October 7, 1948, of the Court of Appeals for the District of Columbia in *WJR, The Goodwill Station, Inc. v. Federal Communications Commission.* Also enclosed with the Solicitor General's letter is a copy of the opinion of the Court of Appeals.

The Solicitor General asks for a statement as to our practice in similar situations and of the potential effect of the decision of the Court of Appeals.

Practice and Procedure in Office of Domestic Commerce.—The Office of Domestic Commerce has issued, pursuant to P. L. 606, 80th Congress, as amended, P. L. 469, 80th Congress, and Sec. 205 of P. L. 793, 80th Congress, certain so-called allocation orders such as Allocation Order M–43 dealing with the control of tin; M–81 dealing with the control of

tin-can manufacturing; M–112 dealing with the control of antimony; R–1 dealing with synthetic rubber and synthetic rubber products; and Orders N–1 and D–1 dealing with the distribution of nitrogenous fertilizer materials. These orders place restrictions of one kind or another on members of industry and these restrictions are frequently found to be burdensome and oppressive.

Each of these orders is implemented and administered by an administrator, under delegations coming down from the Secretary of Commerce. Each one of these orders contains a provision providing for relief or exemption from the provisions of the order. See Sec. 338.13 of the copy of M–43 attached as Exhibit 1.

Such an appeal, or initial submission as it is called, is made to the administrator of the order by the aggrieved party. The administrator considers the material submitted to him and determines whether the case shows that the application of the particular provisions of the order would result in undue and excessive hardships on the appellant not suffered by other similarly situated or would result in improper discrimination. If he finds such hardship or discrimination, he generally grants the appeal, otherwise he denies the appeal. The order itself (such as M–43) does not provide for a hearing, but it is a matter of practice, if the aggrieved party wishes to talk over the problem, for the administrator to discuss it with him informally. This procedure is, of course, in general only possible where the appellant can conveniently get to Washington.

In those cases in which a denial by the administrator of the initial submission is not acceptable to the appellant, he may secure a full review before the Appeals Board of the Bureau of Foreign and Domestic Commerce. This Board, appointed by the Assistant Secretary, has recently been set up by order of the Secretary of Commerce dated February 1, 1949 (49 FR 774), as an impartial reviewing

body to pass upon appeals from orders and regulations of the ODC. It replaces an earlier appeals board established in ODC. The new Board also handles appeals coming up from the OIT but the Board's practices in regard to these matters is not commented upon here.

The Office of Domestic Commerce has long had a regulation, designated Allocations Regulation 3, which spells out the appeals procedure. A copy of AR 3 is attached hereto as Exhibit 2.

There are no pleadings, formal or otherwise, provided for in AR 3. The aggrieved party merely writes a letter addressed to the Board in which he identifies the order or regulation involved and the particular provision thereof, the decision from which he appeals, and his grounds for claiming the hardship or discrimination specified in Sec. 336.52. This letter serves as the petition. The Government files no reply or answer. If the appellant at the hearing chooses to mend his hold, or to take a new line, the Board would undoubtedly accommodate him. The Board makes no sharp distinction between law and fact and it conducts the hearing in an informal fashion. It prefers to have the party himself conduct his case rather than an attorney. There is little in the way of cross-examination although the Government is permitted to ask whatever questions it desires to put to the appellant. There has been no specific provision up to now in AR 3 for oral argument. However, the practice of the Board has always been to allow the defendant to speak his mind in any fashion he chooses, so it may be said that for all practical purposes, oral argument is permitted.

AR 3 is now being amended in view of the fact that the new Appeals Board has been set up. The amendment to AR 3 will not change it in any major respect. But in view of the decision in *WJR* v. *FCC* I think it would be well specifically to provide, probably in paragraph (h) of Sec. 336.61, that the appellant may present an oral argument or file a brief on the law and facts involved if he so desires.

It will be noted that in AR 3 the appellant is given the right to request a hearing. See Sec. 336.61. The Board has never refused to grant a hearing if it is requested. However, if a hearing is not requested, the Board feels free to deal with the appeal on the papers before it. The decision of the Appeals Board is final departmental action. See Sec. 336.58 of AR 3.

In ODC appeals, no case has arisen in which the letter of appeal was so deficient that the Board would feel it could dismiss the appeal as if on demurrer. But if such case did come up, the rule in *WJR* v. *FCC* would apparently require a hearing.

Effect of the decision in WJR v. FCC.—In the case under consideration, the denial of the appellant's petition for reconsideration of the Commission's decision of August 22, 1946, made without an opportunity for hearing, represented the final action of the Commission. In the ODC procedure referred to above a decision by the administrator of an order denying an initial submission by an appellant, is not final agency action. Hence it would appear that an inflexible rule requiring opportunity for oral argument before the administrator is not necessary. But since the Appeals Board's decision is the final departmental action, there is certainly no objection to permitting oral argument if desired, by the appellant particularly as we are now told it is required by due process.

To require oral argument on every matter presented to the administator would impose a substantial burden and would impede the performance of the administrator's duties. The initial submission to the administrator is designed to accomplish prompt and summary action, and in a very high percentage of cases the appellant is satisfied even where his request for relief is denied

by the administrator. I see no necessity for changing our procedure so far as the initial submission to the administrator is concerned. But as stated in the footnote on page 2, in revising AR 3 we will make suitable provision (after consultation with Mr. Harrison Lillibridge, Chairman of the Appeals Board) for oral arguments and briefs when requested by the appellant or by the Government. It may be noted that AR 3 is a public document, published in the Federal Register; and hence all appellants will be deemed to have knowledge of its provisions. They will be there advised that if they request it they may have oral argument or may file briefs.

One final comment. The rule in *WJR* v. *FCC* seems to be merely that the Commission ought not to have dismissed the petition on the ground that it showed no cause of action, without having held a hearing, which would include oral argument. This memorandum goes beyond that, in advocating that appeals procedure include oral argument (and briefs), when requested, as part of due process.

[Copy]

DEPARTMENT OF COMMERCE,

OFFICE OF INTERNATIONAL TRADE,

Washington 25, D. C., March 2, 1949.

MEMORANDUM

To: Mr. Matthew Hale, Acting Solicitor.

From: Nathan Ostroff, OIT General Counsel.

Subject: *WJR, The Goodwill Station, Ines* v. *Federal Communications Commission* (Ct. of App., D. C.)

This is in reply to your request for comments upon the possible effect of the above case upon the operations of the OIT. It is understood that

you will prepare a statement of the Department's position as a whole for submission to the Solicitor General in accordance with his letter of February 3, 1949. I am informed incidentally that the Supreme Court granted certiorari in the case on February 28.

The holding of the U. S. Court of Appeals for the District of Columbia to the effect that an oral hearing is required by the Fifth Amendment on every question of law raised before a judicial or quasi-judicial tribunal conceivably might have a bearing upon (1) OIT procedure in granting or denying individual applications for export licenses and (2) OIT compliance procedure for suspension of export license privileges.

The Export Control Act, as you know, leaves the approval or denial of license applications very much to administrative discretion and as well the determination of criteria or standards used in such determinations. There should be kept in mind in this connection the fact that there is a recognized legal distinction in the matter of delegating legislative powers where foreign affairs are involved, as in the case of export controls, as contrasted to matters of domestic concern. The Courts have always recognized, with respect to the former, that there must be accorded a degree of discretion and freedom from restriction which would not be permitted were domestic matters alone involved. I am not sure, therefore, that the decision here in question, unqualified as it may seem, would necessarily be followed in a similar case under the Export Control Act. I am also not sure whether we fall within the area of a judicial or quasi-judicial agency in administering the licensing phase of export control.

In any event, however, I should point out that we now provide, by regulation, for appeals from our licensing action, and in practice, the Appeals

Board permits oral hearings upon request. You will probably want to check with Harrison Lillibridge, but I should assume that he would like to feel free to dismiss certain cases without such hearings where, in his judgment, they could serve no purpose.

To sum up—the questions are whether the rule in this case applies to export licensing operations; if not, then it does not, of course, apply to cases before the Appeals Board; if so, there is still the question whether oral hearings before Appeals Board suffice to validate our practice of not permitting hearings in the first instance. To the extent that this case casts uncertainty on any of these questions, we, of course, favor an appeal and urge that an effort be made to clarify the rule as to such situations. We would have no objection to being cited as a horrible example of the possible impact of the decision in the light of our handling 10 to 15 thousand license applications per week.

The second application which the WJR ruling might have is to our compliance cases in which we issue orders against violators suspending license privileges for stated periods of time. In practice, oral hearings are held in all except default cases, regardless of the merits or demerits of any answer or other defense which may be offered. Again, however, there may be cases in which we will want to discontinue this practice and we should be free to enter a compliance order on the basis of a written answer which alleges no facts which would constitute a legal defense. The WJR decision would seem to require an oral hearing in this situation unless, as indicated above, there is an implied exception for our operations because of their foreign affairs relationship.

(Signed) NATHAN OSTROFF.

U. S. GOVERNMENT PRINTING OFFICE: 1949

No. 495

In the Supreme Court of the United States

OCTOBER TERM, 1948

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

WJR, THE GOODWILL STATION, INC., AND COASTAL PLAINS BROADCASTING CO., INC., INTERVENOR-RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENT TO APPENDIX B TO BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

CIVIL AERONAUTICS BOARD,
Washington 25, April 15, 1949.

Honorable PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

DEAR MR. PERLMAN: This is in response to your letter of February 3, 1949, with reference to the decision of the Court of Appeals for the District of Columbia in the case of *WJR, The Goodwill Station, Inc.*, v. *Federal Communications Commission*, in which letter you request advice as to the practice of the Civil Aeronautics Board in similar situations and the potential effect of the decision of the Court of Appeals upon the Board.

Since that decision was handed down we have had occasion, doubtless in common with numerous other agencies of the government, to give considerable thought to these very questions. Obviously, the impact of the Court's decision upon the Board's administrative processes will depend upon the universality of the inflexible requirement of oral argument which the decision appears to impose upon administrative processes. If the decision is to be given the widest scope which the language of the majority opinion seems to intend, we believe that a very considerable

disruption of the Board's work could result therefrom.

As background to the effect of such a requirement upon the Board it is desirable to review briefly certain pertinent provisions of the Civil Aeronautics Act of 1938, as amended, and the Board's regulations issued pursuant thereto. Our Act provides for numerous actions to be taken only after notice and hearing. Such, for example, are the issuance of certificates of public convenience and necessity, the fixing of rates, and the approval or disapproval of mergers and acquisitions of control. (Sections 401 (c), 406 (a), 408 (b) and 1002 (d)). The Act also authorizes the Board to take various other actions without making any provision regarding notice or hearing. Such, for example, are the approval and disapproval of interlocking relationships, the approval or disapproval of contracts, and the issuance of exemptions. (Sections 409 (a), 412 (b), 416 (b)).

In still other instances the Act expressly authorizes Board action without hearing as, for example, in the case of the dismissal of complaints which do not state facts which warrant action on the Board's part and the suspension of rates pending hearing with respect thereto. (Sections 1002 (a) and 1002 (g).)

The Act does not define all the elements necessary to constitute a hearing. It does, however, provide that "in all cases heard by an examiner

or a single member, the [Board] shall hear or receive argument on request of either party." (Section 1004 (a).)

There is attached hereto an appendix containing excerpts from the Board's Rules of Practice with regard to the submission of briefs to and oral argument before the Board in its proceedings.

As the above regulations of the Board make plain, the Board construes Section 1004 (a) of the Act to be a requirement that it must in each instance where a hearing is required by statute afford the parties an opportunity to present argument to the Board and have such argument considered by it, but that the Board at its option may permit such argument to be submitted either orally or in writing. The Board has proceeded upon the assumption that there was no inflexible requirement that there be oral argument, and that in appropriate circumstances where such argument would not contribute to the proper disposition of the case, the Board need not hear oral argument.

In general terms, therefore, it is evident that if the *WJR* decision means that oral argument must be received in all matters where a hearing is required, the Board no longer possesses the administrative flexibility in relation to such matters which it has heretofore exercised. While oral argument has been the rule rather than the exception in proceedings where the Act provides for a hearing, the Board has on appropriate

course, the Board has dismissed a number of complaints without oral argument or other hearing pursuant to the express power vested in it by Section 1002 (a) upon a finding that the complaint did not state facts sufficient to warrant action on its part.

In the general field of what might be called procedural motions the imposition of a universal requirement of oral argument would work a substantial hardship on the Board. The most significant matters in this field are motions to intervene, which the Board has regularly disposed of without oral argument. The number of such petitions filed with the Board is very large, and the Board has on various occasions denied such motions, as well as granting them over formal opposition, without oral argument. If the Board were required to hear oral argument on all such motions where requested, a serious drain upon the Board's time could and probably would result therefrom.

A similar problem is presented by motions to consolidate applications in pending proceedings. Here again the Board ordinarily acts without hearing oral argument, and on many occasions has denied consolidations or granted them over objection without such argument. A similar approach is followed with regard to numerous preliminary procedural matters such as motions seeking definition of the scope of proceedings and

petitions for review for examiners' rulings as to evidence, issuance of subpoenas, and the like. Finally, petitions for reconsideration, rehearing and reargument are regularly disposed of without hearing any further argument, even though they purport to present a question of law with regard to the validity of the Board's action. There are a very large number of such petitions.

The *WJR* decision has already formed the basis for a number of demands upon the Board for oral argument and contentions of a legal right thereto in relation to practically all of the foregoing classes of matters. While we find it difficult to believe that the *WJR* case necessarily holds that the parties are entitled to oral argument in relation to all such matters, to the extent that it does so hold the additional demands upon the Board's time could not fail to hamper the performance of its duties under the Act and to slow down its processes in the face of an already overburdened docket. The nature and extent of the demands already made are indicative of the volume of requests for oral arguments on matters where such argument has not heretofore ordinarily been had or expected which is to be expected if the *WJR* decision is generally applicable in all of the foregoing types of situations.

In two appeals to the United States Court of Appeals, District of Columbia Circuit from orders of the Board, the *WJR* case is urged in support

APPENDIX

285.8 *Hearings, Argument, Recommended Decisions, and Proceedings Subsequent Thereto.*

* * * * *

(d) Exceptions to recommend decisions and supporting reasons therefor.

(1) Any party to the proceeding may take exceptions to the recommended decision. Exceptions to findings of fact shall designate, by exact and specific reference, the portions of the record which will be relied upon in support of such exceptions. Exceptions to conclusions of law shall briefly cite the statutory provisions or the principal authorities that will be relief upon in support of the exceptions to the conclusions of law.

(2) After the filing and exchange of exceptions, each party should prepare a single statement supporting its own exceptions and covering any points which it wishes to raise in connection with exceptions filed by others. Exceptions and supporting reasons therefor shall be filed with the Board and not with the examiner.

* * * * *

(f) *Oral argument before the Board.*— If any person desires to argue a case orally before the Board he must request leave of the Board to make such argument. Such request should be filed with the briefs for the Board in the proceeding. The Board will advise the persons making such request as to its decision and if such argument is

to be allowed all persons who have filed briefs in the proceedings will be advised of the date and hour set for such argument and the amount of time allowed to each such person.

285.13 *Procedure in Rate Proceedings.*

* * * * * *

(7) After certification of the record to the Board and completion of any oral argument, the Board will issue a tentative decision. Exceptions to a tentative decision and supporting reasons therefor may be filed within such time as may be prescribed in the tentative decision. Oral arguments to the Board on exceptions to tentative decisions will be permitted only in unusual and exceptional instances for good cause shown, and upon request set forth in the document containing the exceptions and supporting reasons.

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